No. ____

In The
Supreme Court of the United States

MATTHEW LEATH COCHRAN,
FOREIGN AUTO PARTS OF MOBILE, INC., and
PROFESSIONAL ENGINE SERVICE, INC.,
Petitioners,

v.

THE CINCINNATI INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

Whether the due deference accorded a district court's interpretation of its own order applies when the judge interpreting an order is not the same judge that wrote the order.

Whether the third district court judge, in a succession of four, properly struck a counterclaim for malicious prosecution by asserting that the counterclaim "exceeded the scope" of the first judge's order granting leave to amend counterclaims, when the amended counterclaim was filed 8 months earlier with the judge who granted leave to amend.

Whether evidence that the insurance company's investigator previously altered two fire scenes on behalf of other insurance companies represented by an attorney of record in this case was properly excluded without conducting a Fed.R.Evid. 404 (b) analysis.

List of Parties
and
Statement Pursuant to Supreme Court Rule 29.6

Petitioners Foreign Auto Parts of Mobile, Inc. and Professional Engine Service, Inc., are privately owned entities. They have no parent corporation and there is no publicly held company that owns 10% or more of their stock.

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Opinions Below

The ruling of the United States Court of Appeals for the Eleventh Circuit dated December 27, 2006 affirming the decisions of the United States District Court for the Southern District of Alabama (2006 WL 4495335 (C.A.11 (Ala.)), was not selected for publication in the Federal Reporter, and is reproduced as Appendix A at 1a. The prior orders of the District Court are not reported and are reproduced at Appendix B – H. The order of the United States Court of Appeals for the Eleventh Circuit dated February 9, 2007 denying the petition for rehearing is not reported and is reproduced as Appendix J at 32a.

Jurisdiction

The order of the United States Court of Appeals for the Eleventh Circuit sought to be reviewed was entered on December 27, 2006. On January 17, 2007 petitioners' filed a timely petition for panel rehearing with the Eleventh Circuit under Rule 40 of the Federal Rules of Appellate Procedure and 11th Cir. R. 40-3. On February 9, 2007 the Eleventh Circuit entered an order denying the petition for rehearing. This petition for a writ of certiorari is timely under 28 U.S.C. §2101 and Supreme Court Rule 13.1 and 13.3 because it is being filed within 90 days of the date of the denial of rehearing. This Court has jurisdiction to review the order of the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. §1254.

Rule of Evidence Involved

The relevant rule of evidence involved is Rule 404 (b) of the Federal Rules of Evidence, set out at Appendix K at 33a.

Statement of the Case

The jurisdiction of the Federal Court of the Southern District of Alabama was invoked under the Declaratory Judgment Act, 28 U.S.C. §2201, and diversity of citizenship, 28 U.S.C. §1332. Plaintiff/appellee, The Cincinnati Insurance Company ("Cincinnati") filed a complaint for declaratory judgment in the U.S. District Court, Southern District of Alabama, against defendants/appellants, Matthew Leath Cochran, Foreign Auto Parts of Mobile, Inc., and Professional Engine Service, Inc. (hereinafter collectively referred to as "Cochran") regarding its obligation to pay amounts due under policies of insurance. Cochran filed state law tort counterclaims against the Cincinnati based on diversity of citizenship.

A. Summary of the Proceedings

On June 14, 1999 Cincinnati filed a Declaratory Judgment action in the Southern District of Alabama against Cochran. Cincinnati, through its attorney John Richardson ("Richardson") alleged that Cochran burned the building housing his businesses, and refused to pay the Cochran's claim for the fire loss. (R-1, Cincinnati's Complaint). Cochran counterclaimed for the monies due under the applicable insurance policies as a result of the November 11, 1998 fire. (R-17, Mr. Cochran counterclaim).

Cochran was criminally prosecuted in Alabama state court for arson. A significant portion of the evidence that the state relied upon in the prosecution of Cochran originated

directly or indirectly from an investigation conducted by Cincinnati's investigator/expert Harold Deese ("Deese"). The prosecution relied heavily on the physical evidence provided by Deese and his expert opinions regarding that evidence as it relates to the causation of the fire. (R-123, App. N, Affidavit of Judge George N. Hardesty, Jr.).

On November 21, 2001 Cochran entered into an agreement wherein, through his attorney, Cochran stipulated to a prima facie case of misdemeanor arson third degree but expressly denied any involvement in the cause and origin of the fire. Mr. Cochran did not enter a plea of guilty or otherwise make an admission against his interest. (App. N, Affidavit of Judge Hardesty).

On August 5, 2002, Federal district Judge W. Brevard Hand entered summary judgment in the civil declaratory judgment proceeding in favor of Cincinnati and against Cochran. At that time, the district court stated in its order that Cincinnati owed Cochran nothing further under the insurance policies. (R-58 & R-59). Cochran appealed the summary judgment to the Eleventh Circuit court of appeals (R-60). The Eleventh Circuit dismissed the appeal for lack of jurisdiction because the district court's order did not resolve all claims of all the parties. (R-65).

As a result of the Eleventh Circuit's order, Judge Hand directed Cincinnati to file a status report regarding the case (R-66), thus beginning a series of pleadings (R-67, 69, 70, 71, 73, 75-78, 80-83), which ultimately resulted in discovery being reopened, and Cochran being permitted to file an amended answer and counterclaims (R-84).

In 2003, Cochran discovered that in 1986 Deese was investigated by Gerald Maddox, who was a member of the arson division of the Montgomery Fire Department. Maddox

concluded that Deese attempted to alter the "Spread Lounge" fire scene in Montgomery. At that time, Richardson met with Maddox and assured Maddox that he/his firm had not known about Deese's activities and would not use Deese again as a fire investigator/expert. (R-281, App. L, Deposition Fire Marshall Maddox).

Ultimately, Judge Hand reversed his previous order of summary judgment, and ruled that Cochran's counterclaims would be presented to a jury. At that time, Cochran's pending counterclaims were breach of contract, bad faith, and conspiracy. (R-116).

On February 2, 2004 Judge Hand (the first district judge who presided over this case from its inception in 1999 to 2004) conducted a pretrial conference. It came to light that on January 30, 2004 the Circuit Court of Mobile County, Alabama set aside Cochran's arson conviction and dismissed the criminal case against him. The state took the position that Cincinnati's investigator Deese had apparently "been the center of investigation based on his falsifying evidence of arson" and "[w]hile there is no direct evidence that Mr. Deese acted improperly in this particular investigation, his credibility is such that George Hardesty, the former prosecutor who tried the case, now says that he would not have tried the case at all had he known about Mr. Deese's unethical activities." (R-122, App. G, Judge Hand 2/9/04 order; R- 123, App. O, State Response To Rule 32).

Judge Hand ordered Cochran to provide documentation regarding the dismissal of the criminal case and granted Cochran leave to amend his counterclaims. As a result, Cochran amended his counterclaims to include a malicious prosecution count and specifically identify Richardson as a co-conspirator with Deese. (R-122, App. G, Judge Hand 2/9/04 order; R-123, App. O, District Attorney

Response; R-124).

On February 26, 2004, without explanation, the case was reassigned to a second district judge, Callie V.S. Granade. (R-125). Judge Granade presided over this case for 46 days during which time she sealed the record regarding the allegations against Richardson, referred the matter for additional discovery on the new issues raised by Cochran's amended counterclaim and recused herself. (R-138, App. H, Judge Granade 3/3/04 order; R-145 & 147).

Subsequently, Cochran discovered that in 1991 there was a fire at a residence located in Chickasaw, Alabama, which Deese investigated for Richardson's firm. Deese concluded the fire was caused by arson based on physical evidence (fat lighter wood placed under the heater). Chief Matthews, the arson investigator for the city, was certain that no wood was present at the time of the fire or immediately thereafter. (R-281, App. M, Affidavit of Police Chief Perry Matthews).

On April 13, 2004, the case was then transferred to a third district judge, Charles R. Butler. (R-148). Judge Butler presided over the case for approximately one year (R-300), unsealed the record (R-179), struck Cochran's counterclaim for malicious prosecution based on his belief that Judge Hand's previous order did not contemplate the addition of the malicious prosecution claim (R-216, App. B; R-228, App. C - 10/18/04 & 10/28/04 orders of Judge Butler) and excluded evidence regarding Deese having allegedly altering two prior fire scenes ("Spread Lounge" and "Chickasaw") on behalf of insurance companies represented by Richardson. (R-276, App. D; R-296, App. E - 3/17/05 & 4/15/05 orders of Judge Butler).

The case was then transferred to a fourth district

judge, William Steele (R300) and was tried before a jury in November 2005 regarding the declaratory judgment action and the counterclaims for breach of contract, bad faith and conspiracy. (R-356).

Based on Judge Butler's rulings, Cincinnati was allowed to present testimony, from law enforcement officers and others, as well as documents relating to the criminal investigation of Cochran, but Cochran was not allowed to present evidence of the outcome of the state criminal prosecution of Cochran. (R-316, App. I).

Cincinnati denied any conspiracy to alter Cochran's fire scene/evidence to deny the claims. (R-140). Cincinnati asserted accident or mistake as an explanation for Cochran's evidence of fire scene/evidence alterations by Deese. (R-382, p. 486, L15-25; p. 487, L1-9; p. 493 & 494, L1-5; p. 498-499; p. 502, L19-25 & p. 503, L1- 10; P. 535 & 536; p. 542, L 1-5; p. 561 & 562).

The jury returned a verdict in favor of Cincinnati. (R354 & 355).

B. The Evidence Excluded By The District Court

Judge Butler issued an order excluding evidence regarding Deese's investigation activities at the scenes of the Spread Lounge fire and Chickasaw Fire. (R-276, App. D; R-296, App. E)

Regarding the 1986 Spread Lounge fire in Montgomery, Alabama, Cochran sought to offer testimony of Fire Marshall Maddox, who would testify that:

a) Deese was present at the "Spread Lounge" fire scene 22 days after the fire;

b) Deese's car was parked outside the front door of

the Spread Lounge building, and inside the car was a mason jar containing what appeared to be an orange colored liquid resembling gasoline with burnt residues of wood and ash in it. Gasoline mixed with fire debris is used to give fresh gasoline the appearance of being older and/or having gone through a fire event (ie., was present before the fire not after);

c) When Fire Marshall Maddox entered the Spread Lounge and walked down the hallway he smelled gasoline and knew that was not right because large volumes of water were used the night of the fire and in the morning hours, he had walked all of that area previously, it did not go with the burn patterns of the fire, there had been no fire there, and if gasoline had been there it would not have settled in one area or smelled strong because it would have evaporated after twenty two days;

d) Deese was found taking samples from the area soaking wet with fresh gasoline 22 days after the fire;

e) Maddox worked for the Montgomery Fire Department for approximately 20 years, retired as a captain in the arson division of the Montgomery Fire Department and continued his career in law enforcement as a State of Alabama Deputy Fire Marshall;

f) During his over thirty (30) years in law enforcement, Maddox investigated innumerable fires and testified many times as an expert witness on behalf of the government prior to retiring;

g) Maddox concluded from his investigation that Harold Deese had attempted to alter the "Spread Lounge" fire scene;

h) Maddox concluded from his investigation that Deese had brought gasoline to the "Spread Lounge" fire scene and poured it on the carpet samples;

i) Maddox concluded that the raw gasoline is mixed with the fire debris (wood, ash, etc.) in an attempt to make it appear like older gas or as though it had been through a fire;

j) Maddox wrote the insurance company (USF&G) a

letter and received no response. Maddox obtained a subpoena, which he personally served on the insurance company. On the same date, Maddox's supervisor was called downtown and told that there was a complaint about Maddox's investigation, he was not going to get any records, he was relieved of any investigation regarding the fire, and an attorney by the name of Richardson would contact the supervisor to set up an appointment to meet with Maddox;

k) In 1987, attorney Richardson met with Maddox. Maddox explained to Richardson that there was a problem with Deese's investigation; that Maddox was in the process of trying to get records to show a correlation between Deese's work for USF&G and his reports coming back positive for arson; and, that Maddox was trying to build a case against Deese;

l) After Maddox explained his investigation and conclusions to Richardson, Richardson assured Maddox that he had not known these things and that Richardson or his firm would not use Deese again; and,

m) Maddox would not trust Deese to work on anything.

(R-281, App. L, Deposition Fire Marshall Maddox).

Regarding the 1991 Chickasaw fire in Chickasaw, Alabama, Cochran sought to offer testimony of Chief Matthews, who would testify that:

a) He assisted in the fighting of the fire;

b) At that time, he was a police officer and a trained fire fighter for approximately twelve (12) years;

c) In assisting the other firemen in fighting the fire, Matthews worked the area around the heater inside the home;

d) That same night after the fire, Matthews also examined the premises and the heater thoroughly but did not find any circumstances which he felt were suspicious;

e) Several days after the fire, Deese came by Matthews's office and showed Matthews fat lighter wood

("kindling/fire starter sticks") that Deese claimed he had gotten from the fire scene. Deese claimed he found the wood stacked in a pile under the center of the heater on the floor;

f) Matthews did not have any doubts that the wood was not at the heater at the time of the fire or immediately thereafter. Matthews had closely examined the heater the night of the fire from all angles with the aid of a 25,000-candlepower hand-held light and found no fat lighter wood. Further, the area where Deese claimed to have found the wood in a pile under the heater was exposed to water from a straight stream of an inch and a half line resulting in 200 pounds per square inch of water pressure; therefore, the wood would have blown out; and,

g) The home involved in the fire was not the subject of any subsequent arson investigation by the City of Chickasaw.

(R-281, App. M, Affidavit of Chief Matthews)

Regarding the Chickasaw fire, on behalf of the insurance company, Richardson's firm filed a declaratory judgment action against the insured homeowner, David Durham, accusing him of arson based on Deese accusing the insured of utilizing the fat lighter wood to burn his home. Matthews's deposition was taken and the case subsequently was resolved. (R-281, p. 5; and R-289, p. 1-2).

Regarding the fire on November 11, 1998 at Cochran's businesses which spawned this litigation, Deese was the investigator for the insurance company and Richardson was the attorney.

Cochran proposed to offer the following evidence in the case at bar:

a) On November 11, 1998, City of Mobile Fire Investigator Cook was unable to determine the cause of the fire and gave the investigation to his supervisor, Assistant

Fire Marshall Dean, and requested follow up. (R-358, Affidavit of Fire Investigator Cook);

b) On November 12, 1998, Fire Marshall Dean came to the fire scene, found nothing unusual to continue an investigation and released the fire scene to Cochran. (R384, p. 836, L1-23);

c) On November 13, 1998, Deese came to the fire scene, spent several hours, was seen carrying a mass of electrical wiring out of the building and shoving it into a bag in the trunk of a car. Deese was later seen returning to the fire scene and walking out with a box he put in the car trunk containing more items including something that looked like a ground receptacle or a multi-plug in. (R-384, p, 968, L17-25; p. 970, L10 to p. 973; p. 989, L11-25; p. 990, L1-9) (R-385, p. 1192, L15-25; p. 1193 and p. 1194);

d) On November 13, 1998 Deese contacted adjuster Lary and advised that it was a classic arson scene and that Deese was certain the fire was deliberately set by Cochran. (R-384, p. 864);

f) Deese billed Cincinnati for meeting with attorney Richardson on the same day – November 13, 1998 (Box 2, Defendants' Trial Exhibit 12, HD 00170);

g) On November 14, 1998, Deese returned to the fire scene with an electrical engineer, Owen Posey, to conduct an investigation. (R-382, p. 610, L2-6);

h) On November 14, 1998, City of Mobile Investigator Cook returned to the fire scene and found Deese present. Because of the possibility of evidence having been being altered or removed which would compromise the integrity and accuracy of any subsequent investigation, Cook took no further action regarding the investigation. (R-358, Cook Affidavit);

i) Posey admits that, if electrical evidence were removed prior to his investigation, this would undermine his conclusions. (R-383, p. 660, L24-25 and p. 661, L1-3);

j) Cochran saw the fire begin in the bookkeeper's

office behind the computer desk at the north wall. (R-383, p. 735, L2-10);

k) There was a fan in the bookkeeper's office, and plugged into the electrical outlet located behind the computer desk on the north wall where Cochran saw the fire begin ("North Wall Outlet"). (R-384, page 936 L3-15, p. 947, L14-25 and p. 948, L1-16);

l) Posey issued a letter dated November 17, 1998 incorrectly stating that the North Wall Outlet served equipment through the wall in an adjacent office. (Box 2 Defs.' Trial Exhibit 12, HD00309);

m) Posey represented there were only three electrical receptacles in the bookkeeper's office, whereas Deese's original notes/diagram show four. (R-383, p. 655-656);

n) Posey represented that he removed all of the electrical evidence from the fire scene but later admitted that Deese may have taken at least the multiple plug from the scene and there may have been other items Deese removed as well. (R-383, p, 661, L1-14).

o) Ten of Posey's twelve total photos of the scene depicted electrical evidence after its removal and there were no photos of the North Wall Outlet in its undisturbed condition. (R-383, p. 658);

p) Posey represented he only saw one item plugged into the North Wall Outlet, but Deese's original note/diagram shows two items. (R-383, p. 652-653);

q) Deese testified that two carpet samples from the fire scene (to test for petroleum distillates)came from beside and underneath the computer desk, but Deese's original notes and report represented that the two samples came from in front of the desk and from the right side of the door entrance. (R-382, p. 492, L21-25; p. 493, L1,12-25; p.494-495, L1-18).

r) Richardson received a diagram from Deese dated December 10, 1998 showing Deese's carpet sample locations/asterisks as having come from beside and underneath the same computer desk, but when Richardson

provided Deese's report to Judge Hand and Cochran it contained a diagram also dated December 10, 1998 with different sample locations/asterisks (R-382, p. 502, L4-12; Box 2, Def.'s Trial Exhibit 12 HD00004 HD00152; Box 2, Def.'s Trial Exhibit 54, HD00604; R-382, p. 510-511).

s) Deese admitted there could be normal tracking of petroleum distillates at the fire scene, but represented that the distance between the machine shop where distillates were present and the bookkeeper's office was 42 feet instead of the actual distance of 29 feet. (R-281);

t) Within a one week time span, Cincinnati's written reports identify different locations for where Deese obtained his two carpet samples from the fire scene. (R-281, p. 12,¶ 47, w/Ex. P & Q);

u) Deese's carpet sample represented to be taken from the front of the desk underneath the carpet protector came back positive for petroleum distillates but City of Mobile fire investigator Hansen's sample from the same location came back negative. (R-382, p. 441, p. 598, L5-6; R-381, p. 314, L4-18, p. 396, L18-19).

On January 30, 2004, the Alabama state court set aside Cochran's conviction and dismissed the arson case against him. During those proceedings, the District Attorney did not oppose Cochran's motion, noting that "Deese has apparently himself been the center of investigation based on his falsifying evidence of arson" and "[w]hile there is no direct evidence that Mr. Deese acted improperly in this particular investigation, his credibility is such that George Hardesty, the former prosecutor who tried the case, now says that he would not have tried the case at all had he known about Mr. Deese's unethical activities." (R-123, App. O, State of Alabama's Response To Rule 32 Petition).

C. The Decisions Below – Malicious Prosecution

On February 2, 2004 Judge Hand conducted a pretrial conference, three days after the State Court's January 30, 2004 dismissal of the criminal case against Cochran. (R-119).

Following the pretrial conference, Judge Hand issued an order requesting Cochran to provide the court with the documents regarding the criminal case, granted Cochran "leave to amend their counterclaims" and denied Cincinnati's motion to strike Cochran's triable issues, which included conspiring to prosecute Cochran for arson. (R-122, App. G; R-179, p. 3-4).

On February 18, 2004 Cochran filed documentation related to the dismissal of the criminal case and filed the amended counterclaims, which included a count for malicious prosecution. (R-123 and R-124).

On February 26, 2004 the case was reassigned to Judge Granade. (R-125). On March 3, 2004, Judge Granade referred the matter to a Magistrate judge for the entry of a scheduling order to allow the parties to conduct discovery solely on the new issues raised by the amended counterclaim. (R-138, App. H). On April 13, 2004, the case was reassigned to Judge Butler. (R-148).

On June 2, 2004, Cochran filed a motion for leave to add parties and further amend to add a RICO count. (R-146 & R-172).

On August 4, 2004, Judge Butler denied Cochran's motion for leave to add parties and further claims. In that August 4th order, Judge Butler acknowledged that Cochran's proposed pretrial order filed with Judge Hand included factual allegations of conspiracy to prosecute Cochran for arson. Judge Butler also interpreted Judge Hand's February

9, 2004 order to have granted Cochran leave "to amend their counterclaims to conform with allegations in the pretrial order..." (R-179, p. 3-4, 8).

On September 29, 2004 Cincinnati filed with Judge Butler a "motion to clarify" Judge Hand's February 9th order granting Cochran leave to amend. (R-194). On October 18, 2004 Judge Butler granted Cincinnati's motion to clarify and struck Cochran malicious prosecution counterclaim by concluding that Judge Hand did not intend the addition of the malicious prosecution counterclaim and the court had the "inherent authority to enforce its own orders." (R-216, App. B).

Judge Butler's October 18th order provided no explanation for Judge Hand's failure to strike the counterclaim when it was filed with him or, for Judge Granade's failure to strike the counterclaim after the case was transferred to her and she reopened discovery regarding the counterclaim. (R-138, App. H).

Judge Butler's October 18th order provided no explanation for him not striking the counterclaim or enforcing its own order on August 4th when Judge Butler interpreted Judge Hand's February 9th order as to Cochran's motion for leave to add parties and a RICO counterclaim. (R-179, p. 3, 4 & 8).

In Judge Butler's October 18th order he cited two quotes in footnote 1 represented to be from Judge Hand's February 9th order. However, the quotations are not in Judge Hand's order and Judge Butler's wording is different than Judge Hand's. (R-216, page 2, fn 1, App. B).

Judge Butler's October 18th order reasoned that Judge Hand's order granting Cochran "leave to amend their

counterclaims" (R-122,) actually meant "to clarify their conspiracy claim". (R-216, p. 2, App. B). Judge Butler's October 18th order provided no explanation as to why Judge Hand did not state that in his February 9th order.

Judge Butler's October 18th order failed to explain that, in granting Cochran "leave to amend their counterclaims", Judge Hand requested the documentation regarding Cochran's criminal case. (R-122, App. G).

Judge Butler's October 18th order offered no basis for reaching the conclusion that Judge Hand's order was limited to allowing Cochran to "clarify their conspiracy claim", in contrast to his August 4th order that Judge Hand had permitted Cochran "to amend their counterclaims to conform with allegations in the pretrial order." (R-179).

Judge Butler's October 18th order provided no basis for his conclusion of the singular "claim" whereas Judge Hand's February 9th order states "counterclaims".

Judge Butler's October 18th order concluded that "Judge Hand's order contemplated that the amendments would be based on the proposed pretrial order which makes no mention of malicious prosecution." (R-216, p. 2, fn1, App. B).

However, Judge Butler's prior August 4, 2004 order acknowledged that Cochran's pretrial order included factual allegations of conspiracy to prosecute Cochran for arson. (R-179, p. 3).

Cochran's pretrial order contained numerous allegations regarding malicious prosecution and Cochran's triable issues included allegations that Cincinnati conspired with Richardson, Deese and Posey to mislead authorities into

prosecuting Cochran. (R-120, ¶ 23, 24, 26, 29, 30, 31, 32, 35, 36 and 38 of Defendants' Disputed Facts; ¶ 8, 11, 14 and 15 of Section 11A; ¶ 4, 18, 19, 20, 21, 22, 26, 29, 37, 51 and 52 of Section 11B; ¶ 9, 17, 19 and 35 of Defendants' Triable Issues).

Moreover, prior to the February 2nd pretrial conference with Judge Hand, Cincinnati filed an unsuccessful motion to strike Cochrans' Triable Issues. In that motion, Cincinnati alleged that Cochran's pretrial order allegations included allegations that "counsel for Plaintiff [Richardson] and Mr. Owen Posey somehow 'conspired' in the prosecution of Defendants Cochran for arson." (R-121, p. 2).

Judge Butler's October 18th order provided no explanation why Cincinnati, Richardson, Deese nor Posey did not allege that the malicious prosecution counterclaim was improper in their separate arguments to Judge Butler prior to Judge Butler's issuing his August 4th order originally interpreting Judge Hands' February 18th order.

On appeal before a panel of the Eleventh Circuit, based on its decision in *Cave v. Singletary*, 84 F.3d 1350, 1355 (11th Cir. 1996), the Court concluded that the "district court's interpretation of its own order is properly accorded due deference on appeal when its interpretation is reasonable." (App. A, p. 6).

In applying that due deference standard, the Eleventh Circuit affirmed Judge Butler's striking of the counterclaim and concluded that "To resolve the dispute regarding the newly added charge of conspiracy the district court allowed Cochran *limited leave to amend...*" and "...outside the scope of the order, he added a new count of malicious prosecution." (App. A, p. 7).

The Eleventh Circuit reasoned that Cochran, as part of their proposed pretrial order in January 2004, "added new factual allegations of conspiracy which were not contained within the original scope of the pleadings and had not been the subject of any discovery since the lawsuit was filed in 1999." (App. A, p. 6).

Neither Judge Hand's February 9th order nor Judge Butler's October 18th order contain such a finding. In fact, Cochran asserted the counterclaim of conspiracy on March 19, 2003 at the same time they asserted the other counterclaims against Cincinnati (R-87), by prior leave of Judge Hand on February 19, 2003 (R-84; R-116, p. 2 n.1) and after additional discovery was allowed by Judge Hand. (R-84).

In support of its affirmance, the Eleventh Circuit actually quoted Judge Butler's August 4th order denying Cochran leave to add additional parties and RICO claims. (Appendix, page 7). Cochran's motion for leave to add additional parties and RICO claims was filed with Judge Granade after the case was transferred from Judge Hand (R-146; R-172).

C. The Decisions Below – Altering Fire Scene Evidence

Following his Order striking Cochran's malicious prosecution claim, Judge Butler entered orders on March 7, 2005 and April 15, 2005, barring Cochran from making any reference to the Spread Lounge fire; Deese's alleged altering of that fire scene; Richardson's representation that he would not use Deese again (R-276, App. D); and, Deese allegedly subsequently altering the 1991 Chickasaw fire scene in a case wherein Richardson's firm was counsel. (R-296, App. E).

Judge Butler's March 7th order prohibiting the Spread

Lounge Fire evidence was based on his conclusion that the evidence was not relevant except as potential impeachment evidence of Deese under Rule 608(b) of the *Federal Rules of Evidence*, and Judge Butler ruled the evidence had no impeachment value. (R-276, p. 2, App. D).

Cochran's claims for breach of contract, bad faith and conspiracy remained, which included specific allegations of Deese and Richardson involvement in the altering of the Fire Scene and evidence. (R-124, ¶ 18-42, 55-57).

Judge Butler's March 7, 2005 representation of the Spread Lounge Fire evidence failed to mention most of the significant pieces of evidence presented to the court from Fire Marshall Maddox's deposition. (R-276, p. 2, fn2, App. D).

On March 10, 2005, Judge Butler indicated the reason that the Spread Lounge fire evidence was excluded was because Deese had not been convicted of a crime. (R-377, p. 60, L3-21, App. F).

Judge Butler's subsequent April 15th order excluding the Spread Lounge and Chickasaw Fire evidence described Cochran's argument for admission under Fed.R.Evid. 404(b) as "nothing more than another way of alleging that Deese must be lying about his arson findings in this case because he lied about arson on previous occasions". (R-296, p. 2-3, App. E).

Cochran's written pleading before Judge Butler made clear that the Spread Lounge fire and Chickasaw fire evidences proof of motive, opportunity, intent, preparation, plan, knowledge, identity, and the absence of mistake or accident in Cochran's case. Cochran provided Judge Butler examples from the court record of Cincinnati, Richardson,

Deese and Posey altering the subject fire scene/evidence; pointed out that a conspiracy claim was pending and; that Cincinnati's position was the examples in Cochran's case were a mistake or misunderstanding. (R-281).

Judge Butler's April 15th order subsequently concluded that (1) the evidence was not admissible because it was disputed and (2) the prejudicial effect of this evidence far outweighed its probative value. (R-296, p. 3, App. E).

Judge Butler offered no authority for his conclusion that the evidence was not admissible if it was disputed.

Judge Butler's only basis for his conclusion that the prejudicial effect far outweighed its probative value, appears to be that "each prior act would result in a mini-trial" and that the "confusion" would be compounded by the jury being instructed they could only consider the evidence for a limited purpose.

Judge Butler's April 15th order offers no explanation as to how the testimony of Fire Marshall Maddox and Chief Matthews would result in a mini-trial or cause confusion.

In affirming Judge Butler's exclusion of the evidence, the Eleventh Circuit provided no analysis, failed to address any 404(b) issues and simply concluded that the evidence "was not relevant under Fed.R.Evid. 401 in the present case, would unduly prejudice CIC under Fed.R.Evid. 403, and failed to meet the exceptions stated in Fed.R.Evid.403." The Eleventh Circuit provided no discussion of the exceptions to Rule 403.

D. The Effect Of Judge Butler's Rulings

On March 5, 2005, this case was transferred from

Judge Butler to Judge Steele. (R-300).

At that time, Judge Butler had not only excluded the Spread Lounge and Chickasaw Fire evidence (R-276, App. D; R-296, App.E), but also denied Cochran's motion to exclude law enforcement witnesses[1]. (R-273, p. 7, ¶ 25; R-274, App. D).

Judge Steele made clear that the effect of those orders was that law enforcement witnesses could testify regarding evidence gathered during the criminal investigation of Cochran but Cochran could not respond to that evidence by presenting the outcome of the prosecution's dismissal due to Deese investigation activities. (R-316, p. 10-11, App. I).

As a result, at trial, Cincinnati presented law enforcement witnesses[2] (R-356), testimony[3] (R-383, p. 779, 798 L9-13), and documents[4] regarding the criminal investigation of Cochran for arson. (Box 2, Pltf. Trial Ex. 5, 01072-01218; 01316-01329; 01359; and, Ex. 18).

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[1] In light of Judge Butler's striking the malicious prosecution counterclaim, Cochrans' motion in limine had sought to exclude any testimony or evidence regarding the criminal investigation, however, Judge Butler granted only to the extent of precluding reference to "the fact that a criminal investigation was undertaken", but denied any preclusion of testimony regarding evidence gathered during the course of the criminal investigation.

[2] Cincinnati's law enforcement witnesses included Sergeant Berra, who investigated Mr. Cochran for arson on behalf of the police department.

[3] Cincinnati presented testimony that Mr. Cochran "knew that the police had determined that it was a set fire and that he was a suspect" and "he knew that there was a finding of arson".

[4] Cincinnati's documents included references communication between Cincinnati and law enforcement officers regarding law enforcement's ongoing criminal investigation of Mr. Cochran, law enforcement's questioning witnesses, law enforcement waiting on results from the "State Crime Lab", and law enforcement's "crime scene report" indicating the "OFFENSE ARSON"

In response, Cochran was unable to present to the jury the ultimate result of the prosecution or why it was dismissed. (R-316, p. 11-12, App. I)

Also, at trial, Cincinnati denied motive, plan, knowledge or intent to alter Cochran's fire scene/evidence and asserted accident or mistake as an explanation for Cochran's evidence of Cincinnati's conspiracy of bad faith/breach of contract. Deese disputed any intent to identify a different sample location (R-382, p. 498-499). Deese denied collecting or removing any electrical evidence, (R-382, p. 486, L15-25 & p.487, L1-9). Deese admitted his own hand written notes contradicted his testimony about the locations of his samples (p. 493 & 494, L1-5). When presented with two of his own diagrams – each identical except with one of the symbols consistently used to identify his sample locations moved across the room to an entirely different location- Deese claimed it was a typing error (p. 502, L19-25 & p. 503, L1- 10). When faced with his handwritten notes; Deese claimed he may have changed his mind afterwards (p. 504, L6-13). When presented with Cincinnati's report indicating that Deese's sample locations moved-Deese claimed he did not recall that (p. 535 & 536). Deese also denied the content of Cincinnati's own report stating that the first day Deese came to the scene he contacted the adjuster and represented he was certain the fire was deliberately set by insured (p. 542, L1-5). When faced with his own handwritten note of a conversation with Cincinnati's special investigator Fischetti telling Deese to eliminate the extension cord in his report – Deese denies it (p. 561 & 562).

REASONS FOR GRANTING THE PETITION
I. CIRCUITS ARE SPLIT

The Eleventh Circuit's decision in this case to accord

due deference to Judge Butler's interpretation of Judge Hand's order is in conflict with the Second Circuit's decision in *United States v. Spallone*, 399 F.3d 415, 423 (2nd Cir. 2005) holding that when the trial judge did not draft the order at issue, the appellate court applies traditional de novo review to his or her interpretation.

The Eleventh Circuit's deference to Judge Butler's interpretation is based on its prior decision in *Cave v. Singletary*, 84 F.3d 1350, 1354-55 (11th Cir. 1996). The majority's opinion in *Cave* cited *Commercial Union Ins. Co. v. Sepco Corp.*, 918 F.2d 920 921 (11th Cir. 1990), as well as opinions from the Fourth, Sixth and Seventh Circuits. However those opinions addressed a district judge interpreting his own prior order not the order of a different judge.

Deference to a district court judge's interpretation of his or her own order is firmly rooted in the rationale that the judge who drafted the order is in the best position to know what the judge meant to say. *Cave v. Singletary*, 84 F.3d 1350, 1356 (11th Cir. 1996) (Kravitch, dissenting, "the only rationale for doing so – that the district judge who drafted the order is in the best position to know what he meant to say – disappears when the judge doing the interpreting is not the same person as the judge who did the drafting"). See *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified Vessel*, 833 F.2d 1059, 1066-67 (1st Cir. 1987) (citing cases) (recognizing "the special role played by the writing judge in elucidating the meaning and intendment of an order which he authored"); *Truskoski v. ESPN, Inc.*, 60 F.3d 74, 77 (2nd Cir. 1995) (quoting *SEC v. Sloan*, 535 F.2d 679, 681 (2nd Cir. 1976)) ("no basis for substituting our judgment for that of the district judge in interpreting his own order"); *U.S. v. Moussaoui*, --- F.3d ---, 2007 WL 755276 (4th Cir. 2007) ("a district court's interpretation of its own order is for obvious

reasons afforded great weight"); *Alabama Nursing Home Ass'n v. Harris*, 617 F. 2d 385, 388 (5th Cir. 1980) ("Great deference is due the interpretation placed on the terms of an injunctive order by the court who issued and must enforce it"); *United States v. Board of Educ.*, 717 F.2d 378, 382 (7th Cir. 1983) ("Few persons are in a better position to understand the meaning of a [court order] than the district judge who oversaw and approved it.").

The Eleventh Circuit's decision to accord due deference to Judge Butler's interpretation of Judge Hand's order is a departure from the accepted and usual course of judicial proceedings and is devoid of rationale. The importance of this issue of deference can be seen in three ways. One, the Eleventh Circuit's position of according deference to one district judge's interpretation of another district judge's order is devoid of rationale. Two, the result of extending deference can be, as in this case, to undermine the drafting judge's intent or decision. Three, such deference may result in the abdication of the appellate court's duty to conduct a de novo review of issues of law.

Judge Butler was in no better position to interpret Judge Hand's order than the Eleventh Circuit. Judge Butler's striking of the malicious prosecution counterclaim supplanted Judge Hand's decision.

II. DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

Judge Butler's Interpretation Cannot Be Reasonable -

Judge Butler's interpretation of Judge Hand's order cannot be reasonable because it is completely contrary to the plain language of Judge Hand's order and, *post hoc*, adds provisions not there originally. *DirecTV, Inc. v. Leto*, 467

F.3d 842, 845 (3rd Cir. 2006) ("While we normally 'give particular deference to [a] district court's interpretation of its own order,' we cannot do so where the plain language of the order is completely contrary to the Court's interpretation."); *Dudley ex rel. Estate of Patton v. Penn-America Ins.*, 313 F.3d 662, 669 (2nd Cir. 2002) ("While it is certainly true that we accord great deference to a district court's interpretation of its own orders, that deference does not permit the district court, *post hoc*, to add provisions to an order that simply were not there originally.")

Judge Butler's order rewrites Judge Hand's order. First, Judge Butler's order includes quotations represented to be from Judge Hand's order that do no appear in Judge Hand's order and their construction is different than the language of Judge Hand's order. Second, the plain language of Judge Hand's order grants Cochran "leave to amend their counterclaims". However, Judge Butler's interpretation changes that language to "clarify their conspiracy claim". Third, Judge Butler's interpretation of "clarify their conspiracy claim" contradicts his own prior August 4th conclusion that Judge Hand permitted Cochran "to amend their counterclaims to conform with allegations in the pretrial order." Fourth, Judge Butler's interpretation provides no explanation for why Judge Hand did not strike the counterclaim when it was filed with him; why Judge Granade did not strike the counterclaim after the case was transferred to her and, instead, reopened discovery regarding the counterclaim; or, why Judge Butler did not strike the counterclaim when issuing his August 4th order.

Judge Butler's October 18th interpretation found that "Judge Hand's order contemplated that the amendments would be based on the proposed pretrial order which makes no mention of malicious prosecution". However, Judge Butler's prior August 4th order acknowledged that the

proposed pretrial order included factual allegations of conspiracy to prosecute Cochran for arson. In addition, Cochran's pretrial order clearly contained numerous allegations regarding malicious prosecution and Cochran's triable issues included allegations that Cincinnati conspired with Richardson, Deese and Posey to mislead authorities into prosecuting Cochran. Cincinnati's own motion to strike Cochran's Triable Issues made clear that the proposed pretrial order allegations included allegations that "counsel for Plaintiff [Richardson] and Mr. Owen Posey somehow 'conspired' in the prosecution of Defendants Cochran for arson."

Judge Butler's interpretation ignored the fact that Cochran's criminal case was dismissed three days prior to the pretrial conference and, in granting Cochran "leave to amend their counterclaims", Judge Hand requested the documentation regarding Cochran's criminal case.

On appeal the Eleventh Circuit's accorded "due deference" to Judge Butler's interpretation, affirmed his order and added the reasoning that Cochran "added new factual allegations of conspiracy which were not contained within the original scope of the pleadings and had not been the subject of any discovery since the lawsuit was filed in 1999." In fact, Cochran asserted his counterclaim of conspiracy on March 19, 2003 at the same time they asserted the other counterclaims against Cincinnati, by separate prior leave of Judge Hand on February 19, 2003 after an additional discovery period was allowed by Judge Hand. The Eleventh Circuit's affirmance actually quotes Judge Butler's August 4th order denying Cochran leave to add additional parties and RICO claims, which was separate motion filed after the case was transferred from Judge Hand.

Judge Butler's interpretation changed the intent,

words and plain meaning of Judge Hand's order and the Eleventh Circuit sanctioned that interpretation.

Judge Butler's Exclusion Of Evidence Is Contrary To The Law Regarding 404(b)-

The Eleventh Circuit's test for admissibility of 404(b) evidence is: First, the evidence must be relevant to an issue other than the defendant's character; Second, the act must be established by sufficient proof to permit a jury finding that the defendant committed the extrinsic act; Third, the probative value of the evidence must not be substantially outweighed by its undue prejudice, and the evidence must meet the other requirements of Rule 403. In every conspiracy case a not guilty plea renders the defendants' intent a material issue and evidence of such extrinsic evidence as may be probative of a defendant's state of mind is admissible. Difficulty of proving intent in conspiracies is what creates the presumption that intent is always at issue. *United States v. Matthews*, 431 F.3d 1296, 1310-12 (11th Cir. 2005) (citing cases).

Without reference to Cochran's pending conspiracy counterclaim or the 404(b) implications, Judge Butler's original March 7th order concluded that the Spread Lounge Fire evidence was not relevant except as potential impeachment evidence of Deese under Rule 608(b) of the *Federal Rules of Evidence*, and the evidence had no impeachment value. However, the evidence was clearly relevant to establish intent regarding the conspiracy, knowledge and the absence of mistake or accident regarding Cincinnati altering of the Cochran fire scene evidence.

On March 10, 2005, Judge Butler explained that the Spread Lounge fire evidence was excluded because Deese was not convicted. Such a position is contrary to the plain

language of Rule 404(b) and the rulings of this Court. In the Rule 404(b) context similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor. *Huddleston v. United States*, 485 U.S. 681, 689 (1988) (citing, *United States v. Beechum*, 582 F.2d 898, 912-913 (5th Cir. 1978)).

A jury could reasonably concluded from the testimony of Fire Marshall Maddox and Police Chief Matthews that Deese altered fire scene evidence on two prior occasions for insurance companies represented by Richardson. An extrinsic offense under Rule 404(b) includes non criminal activity that impugns the defendant's character. *United States v. Beechum*, 582 F.2d 898, 914, fn 17 (5th Cir. 1978).

Subsequently, in *Dowling v. United States*, 493 U.S. 342, 3 44 (1990), the Supreme Court concluded that neither the Double Jeopardy Clause nor the Due Process Clause barred the use of testimony under 404(b) at a defendant's bank robbery trial relating to an alleged subsequent crime the defendant had previously been acquitted of committing. In reaching that conclusion, this Court reasoned that a jury might reasonably conclude that the defendant was the perpetrator of the alleged subsequent crime, even if it did not believe so beyond a reasonable doubt. *Id.* at 348-49.

Judge B utler's A pril 1 5 o rder e xcluding t he Spread Lounge and Chickasaw Fire evidence disregarded Cochran's burden of proof regarding the conspiracy counterclaim requiring him to establish intent and Cochran's need to rebut Cincinnati's defense of mistake or accident by mischaracterizing the excluded evidence as "nothing more than another way of alleging that Deese must be lying about his arson findings in this case because he lied about arson on previous occasions". However, extrinsic acts evidence may

be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct. *Huddleston, supra* at 685.

Judge Butler's April 15th order concluded that (1) the evidence is not admissible because it is disputed and (2) the prejudicial effect far outweighs its probative value in that "each prior act would result in a mini-trial" and that the "confusion" would be compounded by the jury being instructed they could only consider the evidence for a limited purpose. Judge Butler offered no legal basis for either conclusion. The Supreme Court's prior holdings in *Huddleston and Dowling* involved 404(b) evidence that was disputed and required the testimony of witnesses. See *Huddleston, supra* at 683; See *Downling, supra* at 670.

That the testimony of two law enforcement officers would result in a "mini-trial" is devoid of rationale and Judge Butler's departure from established precedent would render most 404(b) evidence no longer admissible.

An abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction. A district court by definition abuses its discretion when it makes an error of law. *Koon v. U.S.*, 518 U.S. 81, 100 (1996) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 & 405 (1990)). The abuse-of-discretion standard includes a review to determine that the discretion was not guided by erroneous legal conclusions. *Id.* at 100.

In affirming Judge Butler's exclusion of the evidence, the Eleventh Circuit provided no analysis, failed to address any 404(b) issues and simply concluded that the evidence "was not relevant under Fed.R.Evid. 401 in the present case,

would unduly prejudice CIC under Fed.R.Evid. 403, and failed to meet the exceptions stated in Fed.R.Evid.403." The Eleventh Circuit provided no legal basis for its reference to exceptions in Rule 403 and Cochran is unaware of any "exceptions".

Judge Butler's orders excluding the evidence and the Eleventh Circuit's affirmance is contrary to and involved an unreasonable application of clearly established law.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the Eleventh Circuit reversed, the judgment of the District Court set aside, and the District Court's orders striking the malicious prosecution counterclaim and excluding the evidence of Deese altering fire scene's for insurance companies represented by Richardson reversed.

Respectfully Submitted,

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Attorney for Petitioners

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 27, 2006
THOMAS K. KAHN
CLERK

NO. 05-16867
Non-Argument Calendar

D. C. Docket No. 99-005 52-CV-WS-C

THE CINCINNATI INSURANCE COMPANY,

Plaintiff-Counter-Defendant-Appellee,

versus

MATTHEW LEATH COCHRAN,
FOREIGN AUTO PARTS OF MOBILE, INC.,
PROFESSIONAL ENGINE SERVICE, INC.,

Defendants-Counter-Claimants-Appellants.

Appeal from the United States District Court
for the Southern District of Alabama

(December 27, 2006)
Before MARCUS, WILSON and HILL, Circuit Judges.

APPENDIX A

PER CURIAM:

This is an appeal from a jury verdict in favor of plaintiff-appellee The Cincinnati Insurance Company (CIC) and against defendants-appellants Matthew Leath Cochran (Cochran), Foreign Auto Parts of Mobile, Inc. (FAPM) and Professional Engine Service, Inc. (PES). Before ruling, the jury deliberated for three hours.

While this appeal appears at first glance to be onerous and voluminous, the issues presented are quite simple and straightforward. They are premised upon four evidentiary and procedural rulings by the district court during the eight-day trial. Based upon the following discussion, the judgment of the district court is affirmed in all respects.

I.

The issues presented are:

A. Whether or not the district court erred in striking Cochran's counterclaim for malicious prosecution?

B. Whether or not the district court erred in excluding evidence of prior bad acts in previous unrelated trials of Cincinnati's fire cause and origin expert witness, Harold Deese?

C. Whether or not the district court erred in admitting into evidence at trial transcripts of audio recordings when the audio tapes themselves were not available?

D. Whether or not the district court erred in denying Cochran's motion for new trial when a 4,000-page claims file, admitted into evidence and sent to the jury room, contained information in two letters regarding mediation proceedings and offers of compromise?

II.

The facts will be recited only as to how they impact

upon the issues before us on appeal. The same will be true of the procedural history of the case.

Both FAPM and PES were located in the same building at 713 Holcombe Avenue. CIC issued two fire policies to FAPM as the named insured, covering the building, business personal property and loss of business income. It issued one fire policy to PES as the named insured for business contents. Cochran, as owner and officer of the two corporations, was not a named insured.

In 1998, a fire occurred at 713 Holcombe Avenue and caused damage to the structure and loss to the personal property contained therein.[1] In 1999, CIC filed a declaratory judgment action against Cochran seeking to void the policies based upon the alleged arson and misrepresentation of Cochran. Cochran filed a counterclaim against CIC for breach of contract.

In 2000, the proceedings were stayed pending the conclusion of Cochran's criminal trial for second degree arson.[2] The stay was lifted in 2001 and in 2002, CIC amended its complaint to add FAPM and PES as defendants.

Years of tortured procedural jockeying went on as the case meandered through several different judges chambers. Various law firms and attorneys were hired or fired. Twice, summary judgments in favor of CIC were granted. Twice the case was closed.

In 2002, for a third time, discovery was reopened and Cochran amended his counterclaim to add bad faith, misrepresentation, conspiracy and spoliation of evidence. In 2003, also for the third time, CIC's motion for summary

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[1] Before a determination had been made as to the cause of the fire, CIC paid Cochran $25,352.59 for clean up expenses, security and payroll. It paid $102,058.53 to the two mortgage holders on the insured property.

[2] Cochran's first state court trial ended in a hung jury. The matter was reset and Cochran pled guilty to third degree arson. Four years later, his conviction was set aside after the prosecutor filed an affidavit stating that CIC's fire cause and origin expert, Harold Deese, had engaged in unethical activities, i.e., allegedly altering fire scenes and evidence.

judgment was granted, but this time it was granted in part, and denied in part. The district court dismissed two of Cochran's counterclaims, misrepresentation and spoliation of evidence.

In late 2003, the district court set the matter for pretrial conference and a 2004 trial date. In 2004, at the pretrial conference, the district court allowed Cochran to amend and clarify his counterclaims, especially as to conspiracy. When the amended counterclaim was filed, it not only clarified its remaining claim, it added a new counterclaim of malicious prosecution.

The court struck the malicious prosecution counterclaim on two grounds: (1) that Cochran's "slight of hand" inclusion of the counterclaim was outside of the scope of what the court had allowed in its previous order, and (2) that at the time of the pretrial order, Cochran's criminal conviction had not yet been overturned, so that a malicious prosecution claim was not yet ripe for adjudication.

In 2005, the district court granted CIC's motion in limine precluding mention of CIC's expert witness, Harold Deese, prior bad acts in other unrelated trials of allegedly altering fire scenes and evidence, namely one in 1986 referred to as the Spread Lounge fire, and one in 1991 referred to as the Chickasaw, Alabama, fire. It also ruled that Cochran was not a proper counterclaim plaintiff and that Cochran could not maintain any counterclaims against CIC.

At trial, the district court allowed CIC to enter its claims file in excess of 4000 pages into evidence, including over 1,000 pages of transcripts of audio recordings, which CIC represented it could not locate. Also in the claims file were two pieces of attorney correspondence, documents No. 2900 and No. 4369. One letter referred to a prior summary judgment in favor of CIC granted by the district court, before it was later vacated. The second disclosed confidential Eleventh Circuit mediation information and a prior offer of settlement.

APPENDIX A

The case was tried before a jury from November 1, 2005 to November 10, 2005. The jury found in favor of CIC as to breach of contract, bad faith denial of insurance benefits, conspiracy, spoliation of evidence and agency.

III.

As to the striking of the malicious prosecution counterclaim, a district court's interpretation of its own order is properly accorded due deference on appeal, when its interpretation is reasonable. See *Cave v. Singletary*, 84 F.3d 1350, 1355 (11th Cir. 1996). As to the issues regarding the admission or exclusion of evidence by the district court, we review them for abuse of discretion. See *United States v. Jernigan*, 341 F.3d 1273, 1280 (11th Cir. 2002).

IV.

A. Counterclaim for Malicious Prosecution

As part of their proposed pretrial order filed in January 2004, Cochran, FAPM and PES added new factual allegations of conspiracy which were not contained within the original scope of the pleadings and had not been the subject of any discovery since the lawsuit was filed in 1999. CIC filed a motion to strike. At the February 2004 pretrial conference, the district court found that the counterclaims remaining were breach of contract, bad faith denial of insurance benefits, and conspiracy.

To resolve the dispute regarding the newly added charge of conspiracy the district court allowed Cochran limited leave to amend: "[I]n light of the factual allegations made by Defendants in the proposed pretrial order ..., in particular factual allegations in connection with Defendants' counterclaim for conspiracy, the Court hereby GRANTS to Defendants LEAVE TO AMEND their counterclaims ... so

as to clarify the specific nature of their allegations." (Emphasis in original). Cochran amended and expanded his conspiracy allegations to conform to the order. However, outside the scope of the order, he added a new count of malicious prosecution.

The district court responded: "Even though [the district court], in February 2004, permitted [defendants] to amend their counterclaims to conform with allegations in the pretrial order, [its] order did not contemplate the addition of parties, nor did it contemplate the addition of RICO claims against the existing counterclaims defendant."[3] We agree. The district court was well within its discretion when it struck the malicious prosecution counterclaim on the basis that it exceeded the scope of the original order. This issue is affirmed.

B. Exclusion of Expert Witness Bad Acts

We have carefully studied the voluminous record on this issue in this appeal. We conclude that the district court acted

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[3] In finding that the defendants exceeded the permission granted by the order, adding the malicious prosecution counterclaim never before asserted, the court stated:

[The district court] granted leave to amend in light of factual allegations in the proposed pretrial order 'related to the conspiracy claim' to 'clarify the nature of those allegations.' Granting permission to clarify factual allegations is not equivalent to granting permission to add counterclaims. Moreover, [the district court's] order contemplated that the amendments would be based on the proposed pretrial order which makes no mention of malicious prosecution. While there is some overlap between the allegations related to the conspiracy claim and the late-added malicious prosecution claim, a key element of malicious prosecution (termination of the underlying action in favor of the party seeking recovery) could not have occurred until after the proposed order was filed on January 23, 2004. Defendant Cochran pled guilty in the underlying state criminal case, and the conviction was not vacated until January 30, 2004, when the state court granted a Rule 32 petition.

well within its discretion in determining that evidence that CIC's expert witness Harold Deese allegedly tampered with two former fire scenes was not relevant under Fed.R.Evid. 401 in the present case, would unduly prejudice CIC under Fed.R.Evid. 403, and failed to meet the exceptions stated in Fed.R.Evid. 403. This issue is affirmed.

C. Admission of Audio Tape Transcripts

We have also carefully studied the voluminous record on this issue in this appeal. It is clear that CIC did not have either the originals nor copies of the audio tapes. At trial, CIC indicated its intent to introduce the claims filed which contained the transcripts at issue. Cochran stated at trial at a conference held outside the presence of the jury that he no objection to CIC offering its claim file into evidence. However, in the presence of the jury, Cochran voiced his objection. The district court overruled the objection and admitted the claim file, including the audio transcripts. The district court did not abuse its discretion in so ruling. This issue can also be affirmed.

D. Motion for New Trial Denied Based Upon Two Letters in the Claim File

This post-trial objection was not properly preserved at trial when CIC's claim file was properly admitted into evidence. A party must raise an objection to the evidence at the time it is introduced or this objection is waived. *Healthtrust, Inc. v. Cantrell*, 689 So.2d 822, 825-26 (Ala. 1999). We cannot consider this issue on appeal.

V.

Based upon the foregoing discussion, the four trial issues raised on appeal regarding procedural and evidentiary issues and the judgment from which the appeal is taken are AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION
FILED OCTOBER 18, 2004

THE CINCINNATI INSURANCE COMPANY, INC.

Plaintiff;

v. CIVIL ACTION NO. 99-0552-CB-C

MATTHEW LEATH COCHRAN, et al.

Defendants.

ORDER

Plaintiff has filed a motion (Doc. 194) for clarification of Judge Hand's order dated February 9, 2004. Plaintiff asserts that the order at issue, which permits amendment of the pleadings to conform to allegations in the pretrial order, did not contemplate addition of a counterclaim for malicious prosecution and, therefore, the counterclaim should be stricken. Defendants object (Doc. 210) only on the ground that plaintiffs attempt to strike the counterclaim is untimely because it was filed more than six months after the amended counterclaim.

> Judge Hand's February 9th order granting leave to amend states, in relevant part, as follows:
>
> In light of factual allegations made by the Defendants in the proposed pretrial order (Doc. 120), in particular factual allegations in connection with Defendants' counterclaim for conspiracy, the Court hereby **GRANTS** to Defendants **LEAVE TO AMEND** their counterclaims (doc. 87) so as to clarify the specific nature of their allegations.

(Doc. 122.)

APPENDIX B

Defendants cite several rules, none of which are applicable, in support of their timeliness argument. First, they cite Local Rule 6 ... "regarding Briefs and Motions," There is, however, no Local Rule 6. Based on defendants' reference to a ten-day response period, the Court assumes they meant to refer to Local Rule 7.1, which requires that briefs in opposition to a Rule 12(b) motion to dismiss be filed within ten days after the motion to dismiss was filed. Since plaintiff was responding to an amended counterclaim, not a motion to dismiss, LR 7.1 is inapplicable. Next, defendants cite Fed.R. Civ. P. 8(d), for the proposition that "averments in a pleading to which a responsive pleading is required... are admitted when not denied in the responsive pleading." (Defs.' Objection, p. 2.) That rule has no applicability here because plaintiff filed an answer to the counterclaim denying the relevant allegations. Finally, defendants cite Rule 15(a) for the proposition that plaintiff had only ten days to respond to the amended counterclaim. As noted, plaintiff did respond by filing an answer.

Having obtained leave of Court to amend their counterclaims in one limited respect, i.e., to clarify their conspiracy claim, defendants exceeded the permission granted and added a counterclaim never before asserted-malicious prosecution. This sleight of hand went undetected for a period of months, and now defendants allege that it is too late for the Court to do anything about it.[1] Whether

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[1] In their objection defendants attempt to justify opposition to the motion to clarify only on the ground that the objection is untimely. They do not claim that Judge Hand intended to grant leave to add a malicious prosecution claim. And if they did, their claim would be rejected. Judge Hand granted leave to amend in light of factual allegations in the proposed pretrial order "related to the conspiracy claim" to "clarify the nature of those allegations." Granting permission to clarify factual allegations is not equivalent to granting permission to add counterclaims. Moreover, Judge Hand's order contemplated that the amendments would be based on the proposed pretrial order which makes no mention of malicious prosecution. While there is some overlap between the

plaintiff failed to exercise diligence in calling this discrepancy to the Court's attention is unimportant.[2] The Court has inherent authority to enforce its own orders. Defendants' counterclaim for malicious prosecution exceeded the scope of Judge Hand's order and is therefore due to be and hereby is **STRICKEN.**

DONE and **ORDERED** this the 18th day of October, 2004.

s/CHARLES R. BUTLER. JR.
UNITED STATES DISTRICT JUDGE

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allegations related to the conspiracy claim and the late-added malicious prosecution claim, a key element of malicious prosecution (termination of the underlying action in favor of the party seeking recovery) could not have occurred until after the proposed order was filed on January 23, 2004. Defendant Cochran pled guilty in the underlying state criminal case, and the conviction was not vacated until January 30,2004, when the state court granted a Rule 32 petition.

[2] The delay is understandable in this case. The attorneys who had represented plaintiff since the beginning of this lengthy litigation were forced to withdraw when defendants named them as conspirators in the February 2004 counterclaims. Since plaintiff's current counsel was not involved in the Pretrial Conference before Judge Hand, the discrepancy would not have been readily apparent to them. Moreover, plaintiffs counsel have not been sitting idly by these past few months, given the activity in this case.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FILED OCTOBER 28, 2004

THE CINCINNATI INSURANCE COMPANY, INC.,
Plaintiff;)

v. CIVIL ACTION NO. 99-0552-CB-C
)

MATTHEW LEATH COCHRAN, et al.
Defendants.)

ORDER

Defendants have filed a motion requesting that the Court reconsider its order striking defendants' counterclaim for malicious prosecution. In their motion to reconsider, defendants allege facts that could have been asserted in their initial response to plaintiff's motion to strike. "'Motions to reconsider serve a limited function; to correct manifest errors of law or fact or to present newly discovered evidence.'" *Rothwell Cotton Co. v. Rosenthal & Co.* 827 F.2d 246, 251 (7th Cir. 1987) (quoting *Keene Corp. v. Int'l Fidelity Ins. Co.*, 561 F. Supp. 656 (N.D. Ill 1982), affd, 736 F.2d 388 (7th Cir. 1984)). Defendants have pointed to no manifest error of law or fact, nor have they presented any newly discovered evidence. Accordingly, the motion to reconsider is **DENIED**.

DONE and **ORDERED** this the 28th day of October, 2004.

s/CHARLES R. BUTLER, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

Case 1:99-cv-00552-WS-C Document 276 Filed 03/07/2005

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THE CINCINNATI INSURANCE COMPANY, INC.)
Plaintiff,)

v. CIVIL ACTION NO. 99-0552-CB-C)

MATTHEW LEATH COCHRAN, et al.)
Defendants.)

ORDER

This matter is before the Court on plaintiffs "Motion in Limine Regarding Alleged Prior Bad Acts of Cincinnati's Expert Witness, Harold Deese[,] and John Richardson." (Doc. 240.) Plaintiff seeks to preclude defendants from referring to or introducing evidence of the following at trial: (1) that plaintiff's expert, Harold Deese, allegedly tampered with a fire scene in 1986 ("the Spread Lounge Fire incident"); (2) that John Richardson, plaintiffs former attorney, knew of the Spread Lounge Fire incident; (3) that Richardson hired Deese for this case; (4) that Richardson directed Deese to spike the fire scene in this case; (5) that Richardson directed Deese to take any action when Deese at the fire scene conducting his investigation. Defendants have filed no response to plaintiffs motion in limine. The motion in limine actually relates to three separate issues. First, is evidence that Deese is alleged to have tampered with a fire scene in 1986 admissible to impeach him in this case? If so, is evidence that Richardson knew about the 1986 incident admissible? Third, is evidence that Richardson directed Deese to tamper with the fire scene in this case admissible? The Court concludes that evidence related the first two issues is not admissible, but that evidence related to the third is, *if*

such evidence exists.[1]

Evidence regarding the allegation that Harold Deese spiked the scene of the Spread Lounge Fire to make it appear as though arson had been committed[2] is not admissible. First, it is not relevant except as potential impeachment evidence of Deese under FRE 608(b),[3] which states:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of a crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness be inquired into on cross-examination of

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[1] Plaintiff insists that defendants have no evidence to support these allegations which defendants have made during the course of this litigation.

[2] In 1986, Harold Deese investigated a fire scene in Montgomery, Alabama for USF& G Insurance. Gerald Maddox, who was then a lieutenant with the Montgomery Fire Department, has testified at deposition in this case that he believed that Deese poured gasoline at the fire scene after the fact, making it appear as though the fire had been caused by arson. Maddox's belief is based on the following: (1) The presence of gasoline was not detected immediately after the fire, three weeks earlier; (2) Maddox walked in on Deese's investigation and smelled fresh gasoline; (3) The bum pattern did not indicate the use of an accelerant. Maddox began an investigation of Deese, but his superiors took him off the case, and no charges were brought against Deese. Deese denies that he altered the scene and alleges that Maddox may have sought to discredit him because Maddox's investigation of the fire was inadequate.

[3] Relevant evidence is evidence having any tendency to make the existence of a fact in issue more probable or less probable. FRE 401. An allegation that an insurance investigator altered a fire scene in 1986 does not make it more likely that he did so in 1997. Even if it did, relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury..." FRE 403. Since Deese denies the allegation, there is a substantial likelihood of unfair prejudice and confusion of the issues. If defendants introduced extrinsic evidence on the issue, then plaintiffs would be entitled to rebut it-resulting in a mini-trial on a peripheral issue.

the witness [ ] concerning the witness' character for truthfulness or untruthfulness.

Thus, the only potential use defendants could make of this evidence is to inquire on cross examination of Deese whether he altered the Spread Lounge Fire scene, an allegation Deese denies. Since Deese's answer would be "no," the evidence has no impeachment value. Therefore, the Court, in its discretion, will preclude defendants from mentioning to the jury, questioning any witness about or presenting evidence of the Spread Lounge Fire incident.

Since evidence regarding the Spread Lounge Fire is not admissible, it follows that evidence that plaintiffs former attorney, John Richardson, knew about the incident also is not admissible. Defendants may not mention to the jury, question or cross examine any witness about, or present any evidence regarding John Richardson's knowledge of the Spread Lounge Fire incident.

The final issue presented by this motion in limine is whether defendants can offer evidence or mention at trial that Richardson either directed Deese's actions at the fire scene in this case or, more specifically, directed Deese to alter the fire scene. Plaintiff's motion is premised on its assertion that no such evidence exists. The Court cannot grant a motion in limine to preclude the presentation of evidence that does not exist. To the extent that plaintiff are seeking to preclude defendants from mentioning these theories in opening statement or closing argument, the Court cannot make such a determination at present. What counsel may assert in opening statement depends upon what he expects, in good faith, that the evidence will show. What counsel may argue in closing depends upon the evidence actually presented.

In conclusion, plaintiff's motion in limine is **GRANTED**, in part, as to the Spread Lounge Fire incident and John Richardson's knowledge of it. The motion is **DENIED**, in part, as to the Richardson's alleged direction of

APPENDIX D

Deese's actions at the fire scene at issue here.

DONE and ORDERED this the 7TH day of March, 2005

s/CHARLES R. BUTLER. JR.
UNITED STATES DISTRICT JUDGE

APPENDIX E

Case 1:99-cv-00552-WS-C Document 296 Filed 04/15/2005

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THE CINCINNATI INSURANCE COMPANY, INC.)

Plaintiff,)

v. CIVIL ACTION NO. 99-0552-CB-C

MATTHEW LEATH COCHRAN, et al.)

Defendants.)

ORDER

This matter is before the Court on motions and responses[1] regarding the admissibility at trial of certain prior-act evidence defendants propose to use against one of plaintiffs experts. These prior acts involve allegations that plaintiffs fire origin expert, Harold Deese, altered fire scenes during two previous, unrelated fire investigations. The first was a 1986 investigation at the Spread Lounge in Montgomery, Alabama, where a fire department investigator alleged that Deese poured an accelerant at a fire scene ("Spread Lounge fire"). The second, which defendants only recently discovered, was a 1991 investigation of a fire in Chickasaw, Alabama ("Chickasaw fire") where, according to a Chickasaw fire fighter, Deese found kindling in an area where none had been immediately after the fire. The Court has previously ruled that evidence of the 1986 Spread Lounge fire incident is not admissible, but defendants filed a

[1] The pleadings addressed by this motion are: (1) defendant's objection to plaintiff's motion in limine (doc. 281); (2) defendants' motion to amend the pretrial order (doc. 282); (3) plaintiff's motion in limine regarding 1991 fire (doc. 286); (4) defendant's response (doc. 289).

response to the motion before receiving the Court's order. Because the response raises an issue not addressed in the Court's order, the Court will reconsider in light of defendants' response. In addition, the Court will address the admissibility of evidence related to the 1991 Chickasaw fire.

Extrinsic evidence that a witness committed crimes, wrongs or other acts in the past is not admissible to prove that he acted similarly on a subsequent occasion. *United States v. Veltmann*, 6 F.3d 1483, 1498 (11th Cir. 1993). Therefore, extrinsic evidence of prior acts, such as the allegations that Deese altered fire scenes in the past, cannot be admitted into evidence for the purpose of proving that he altered the fire scene in the instant case. Such evidence may be admitted for other purposes, however, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." FRE 404(b). It is, according to defendants, one of these purposes for which the evidence is offered.

For extrinsic evidence of prior acts to be admitted under a 404(b) exception, the defendants "(1) a proper purpose for introducing the evidence; (2) that the prior act occurred and that the defendant was the actor; and (3) that the probative value of introducing the evidence outweighs any prejudicial effect he evidence might have." *United States v. Cancilliere*, 69 F.3d 1116, 1124 (11th Cir. 1995). Defendants argue that the evidence is admissible to prove knowledge, absence of mistake and, apparently, lack of coincidence. According to defendants, the evidence tends to prove "knowledge of the plaintiff through its attorney" who was aware of the allegations against Deese in the Spread Lounge fire incident. Defendants do not identify the "knowledge" that should be imputed to plaintiff or the issue to which that knowledge is relevant. As to "absence of mistake" defendants merely list several actions allegedly taken by Deese during his investigation in this case (e.g., falsely stating the location of a carpet sample, misrepresenting distances on a fire scene

report, removing fire scene evidence, etc.) and asserts that the prior-act evidence demonstrates that Deese's actions were not the result of mistake. Left unexplained is why the specifics of the prior acts make it more likely that specific actions in this case were not due to mistake. An investigator who uses kindling or gasoline to stage a fire scene is not less likely to make a mistake regarding totally unrelated matters, such as recording the location of a sample or making a mistake in measurement. Defendants' "absence of mistake" examples are nothing more than another way of alleging that Deese must be lying about his arson findings in this case because he lied about arson on previous occasions. Finally, defendants offer the evidence to prove the obviously inadmissible-mat Deese's "ruling 'arson' 70-80 [sic] of the fire scenes he investigates is no coincidence." (Defs.' Brf. at 14.)

Even if there were a permissible purpose for admitting defendants' prior-act evidence, the evidence would fail the remaining prongs of the Rule 404(b) admissibility determination. First, plaintiff's evidence that the prior acts occurred is disputed. Second, even assuming, *arugendo*, that the evidence proffered would be sufficient for the jury to find that Deese committed the prior acts alleged, the prejudicial effect of such evidence far outweighs its probative value. Because the allegations presented by the defendants are disputed, each prior act would result in a mini-trial requiring the jury to determine, in addition to the many other issues presented in this case, whether Deese altered fire scenes in the past. Then, to compound the confusion, the jury would be instructed that if they found Deese did so, they could only consider that evidence for a limited purpose (e.g., knowledge or absence of mistake). In sum, if the prior-act evidence had any probative value, it is certainly outweighed by the prejudicial effect such evidence would have at trial.

For the reasons set forth above, the Court finds that defendants may not introduce at trial evidence of either the Spread Lounge fire or the Chickasaw fire. Accordingly, the

APPENDIX E

Court **AFFIRMS** its prior order granting, in part, plaintiffs' motion in limine regarding the Spread Lounge fire (doc. 276), **GRANTS** plaintiffs motion in limine regarding the Chickasaw fire (doc. 286), and **DENIES** defendants' motion for leave to amend the pretrial order to include evidence regarding the Chickasaw fire (doc. 282).

DONE and **ORDERED** this the 14th day of April, 2005

s/Charles S. Butler, Jr.
Senior United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THE CINCINNATI INSURANCE COMPANY,	*	No. CV-99-552
Plaintiff,	*	
	*	
Vs.	*	Mobile, Alabama
	*	March 10th, 2005
MATTHEW L. COCHRAN,	*	1:30 p.m.
	*	
Defendant.	*	
	*	

* *

VOLUME I
TRANSCRIPT OF PRETRIAL CONFERENCE
BEFORE THE HONORABLE CHARLES R. BUTLER, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:	MICHAEL B. BEERS WILLIAM F. PATTY ATTORNEYS AT LAW MONTGOMERY, ALABAMA
FOR THE DEFENDANT	STEPHEN M. TUNS TALL ATTORNEY AT LAW MOBILE, ALABAMA
COURT REPORTER	EDWIN J. HOWARD

EDWIN J. HOWARD, OFFICIAL COURT REPORTER

APPENDIX F

[SKIP TO PAGE 59-60 OF TRANSCRIPT]

THE COURT:

Yeah.

BY MR. TUNSTALL:

It's good lawyering to try to define what the playing field is, for purposes of a debate. Because you can frame it in a way that you realize that you can win that debate. So they are asked very specific questions. Are you contending Deese spiked the scene, i.e., are you contending that somebody sees Deese coming, poured gasoline on a carpet sample like in '86. The response has been, no. Because the contention is that he has altered the fire scene and altered the fire scene evidence, just like he did in '86 and like he did in '91. And how he did –

THE COURT:

Like he was accused of doing in '86.

BY MR. TUNSTALL:

By retire state Fire Marshall –

THE COURT:

Doesn't matter who accused him. He was accused of it. He was never proved to have done it, right?

BY MR. TUNSTALL:

Because his investigation was stopped, I believe, Judge.

THE COURT:

It doesn't matter. There was an accusation. Had he been convicted of it, your evidence probably comes in. Although some question of remoteness. But people get accused of things all the time. All the time. Doesn't matter who accused them.

BY MR. TUNSTALL:

I believe the Fire Marshall, the chief had any motivation to –

THE COURT:

Not a question of whether they had the motivation or not. It's an accusation. Okay? And if we

were to go into that, I am not going to rehash the reason for the order, but would be trying now three cases, because you want to bring in '91. I am going to look at that afresh because that is more fresh and I will take a look at it. But, you know, that is the reason that doesn't come in. And the suggestion that the lawyer, you know, had something to do with prompting Deese to come on to this scene and gave him a wink and a nod and said, we'll do the same thing to this one as you did in '91 and '86, is a stretch.

Let me tell you, so you will know. John Richardson is somebody I see once every two years. You know, I don't know John from any other lawyer in Mobile. But it's a pretty serious accusation you paint him with and without strong evidence, him or anybody else. If you said Fred Smith told, or one of these insurance companies, not lawyers but people told Deese to do that, that is still a pretty serious accusation.

BY MR. TUNSTALL:

Judge, we've got sample – we've got a report coming to John Richardson's office, Deese's report and cover letter, containing diagrams of his samples coming from underneath and beside singular desk. We then have a report going to the court with the samples, one moving outside the desk and the other moving across the room.

THE COURT:

Now, when you have Deese on the stand – you are talking about in this case?

MR. TUNSTALL:

Judge, if I may add on other thing?

THE COURT:

But in this case, you are talking about?

BY MR. TUNSTALL:

Yes, sir.

THE COURT:

To the Court, you mean to the DA's office or whoever down there?

APPENDIX F

BY MR. TUNSTALL:

No, sir. In the report that was given to this court for purposes of summary judgment motions, he provided a report with a diagram that is dated that same as the diagram that he was provided from Deese, originally. But it's different in that the sample locations have moved. One to in front of the desk and the other across the room. The report matches up with the altered sample locations given to the court. But what was given to John Richardson's office from Harold Deese was his original sample locations which are beside the desk and underneath the desk.

THE COURT:

As evidence of Deese altering the reports. Okay? That evidence could very well be relevant. And how he altered it or who he altered it, or who he may have shared it with may be relevant. But the fact that Richardson and Deese had some connection with an '86 fire, that there is an allegation that Deese spiked, is not relevant. But if you have evidence that Deese prepared this report and gave it to Richardson, and I wasn't quite following you, and prepared another report. Or it was filed in the court and another on appears, you know, that they may well be.

BY MR. TUNSTALL:

You Honor, if I may add. The '86 and '91 incident are a response to what Cincinnati's position and Harold Deese's position has been, which is, this is a misunderstanding. This is just a perception problem. But when you take what we believe is compelling evidence – if I could lay it out before you, I believe it could be compelling evidence, as to what transpired with just the carpet samples, forgetting all the other evidence we have. And you view that in light of and in response to them saying it's a mistake. In light of the '86 incident and the '91 incident and the – it shows plan. Shows the absence of mistake.

THE COURT: That's your 404(b) argument and they are going to respond to that.

APPENDIX F

BY MR. TUNSTALL:
Yes, sir.

[SKIP TO CERTIFICATE OF TRANSCRIPT]

CERTIFICATE

STATE OF ALABAMA)
COUNTY OF MOBILE)

I, Edwin J. Howard, do hereby certify that the above and foregoing transcript of proceedings in the matter aforementioned was taken down by me in machine shorthand, and the questions and answers thereto were reduced to writing under my p ersonal supervision, and that the foregoing represents a true and c orrect transcript of the proceedings had upon said hearing.

EDWIN J. HOWARD
OFFICIAL COURT REPORTER
UNITED STATES COURTS

EDWIN J. HOWARD, OFFICIAL COURT REPORTER
U.S. COURT

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION
FILED FEBRUARY 9, 2004

THE CINCINNATI INSURANCE COMPANY,)
)
Plaintiff,)
CIVIL ACTION NO. 99-0552-BH-C
v.)
)
MATTHEW LEATH COCHRAN, etc, et al,)
Defendants.)

ORDER

This matter is before the Court on the proposed pretrial order (Doc. 120) and Plaintiffs motion (Doc. 121) to strike, both of which were addressed by the parties at the Initial Pretrial Conference held on Monday, February 2, 2004 at the United States District Courthouse in MOBILE, Alabama Subsequent to this Court's order (Doc. 116) of August 4, 2003, granting in part and denying in part Plaintiffs revised motion (Doc. 48) for summary judgment, this action now encompasses: Plaintiffs claim for a declaration that it owes nothing further to Defendants under the insurance policies in question; Defendants' counterclaim for breach of contract; Defendants' counterclaim forbad faith denial of insurance benefits; and Defendants' counterclaim for conspiracy.

In light of factual allegations made by Defendants in the proposed pretrial order (Doc. 120), in particular factual allegations in connection with Defendants' counterclaim for conspiracy, the Court **hereby GRANTS** to Defendants **LEAVE TO AMEND** their counterclaims (Doc. 87) so as to clarify the specific nature of their allegations. Furthermore, Defendants are **hereby ORDERED** to provide this Court

APPENDIX G

with documentation of fee current status of Defendant Matthew Leath Cochran's criminal conviction for Arson in the Third Degree. Defendants are **hereby ORDERED** to file their amended counterclaims and criminal status documentation **on or before Monday, February 23, 2004.**

In consideration of the foregoing, Plaintiffs motion (Doc. 121) to strike is **hereby DENIED.** Moreover, the Clerk is **hereby DIRECTED** to terminate the deadlines for the Final Pretrial Conference, Jury Selection, and Jury Trial. Each of these events is continued until farther order of this Court.

SO ORDERED this 9th day of February, 2004

s/W.B.Hand
SENIOR DISTRICT JUDGE

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION
FILED MARCH 3, 2004

THE CINCINNATI INSURANCE COMPANY,

Plaintiff,

v. CIVIL ACTION NO. 99-0552-CG-C

MATHEW LEATH COCHRAN et al.,

Defendants.

ORDER

This matter is before the court on the motions of John D. Richardson and the law firm of Richardson, Spear, Spear & Hamby, P.C., to place pleadings under seal (Doc. 127), and the motion of Owen S. Posey P.E. and R. Harold Deese to join in the above motion (Doc. 131). These non-parties request that the court place under seal: the amended proposed pretrial document (Doc. 120), defendants' amended counterclaims (Doc. 124), the motion of Richardson and his law firm to place the pleadings under seal (Doc. 127) and supporting brief (Doc. 128), the motion of Posey and Deese to join (Doc. 131) and the memorandum in support filed by Richardson and his firm (Doc. 133). A hearing was held on March 2, 2004, on the above matters. "While commercial harm or embarrassment of a party does not alone justify sealing the entire record of a case," "it is appropriate to seal certain records when those particular records contain highly sensitive and potentially embarrassing personal information about individuals." Rossbach v. Rundle, 128 F.Supp.2d 1348, 1352 (S.D. Fla. 2000) (citing Wilson v. American Motors Corp., 759 F.2d 1568, 1570-71 (11th Cir. 1985); Doe v. Blue

APPENDIX H

Cross & Blue Shield United of Wisconsin, 112 F.3d 869, 872 (7th Cir. 1997); and United States v. Stoneman, 776 F.2d 1104 (3rd Cir. 1985)). "When the sensitive information pertains to non-parties who are not public figures, the balancing of interests in favor of protecting the privacy of the non-parties and against uninhibited access to the records is strengthened." Id. Until such time as the court can determine whether there is a basis for the allegations made, the court finds that the interests in protecting the privacy of the non-parties outweighs the interests in public access. The court will allow the parties to conduct discovery on the new issues raised by the amended counterclaim.

CONCLUSION

For the reasons set forth above, the motions of John D. Richardson, the law firm of Richardson, Spear, Spear & Hamby, P.C., Owen S. Posey P.E. and R. Harold Deese to place pleadings under seal (Docs. 127 & 131) are **GRANTED** to the extent that the **Clerk** is **DIRECTED** to **SEAL** the following documents: the amended proposed pretrial document (120), defendants' amended counterclaims (Doc. 124), the motion of Richardson and his law firm to place the pleadings under seal (Doc. 127) and supporting brief (Doc. 128), the motion of Posey and Deese to join (Doc. 131) and the memorandum in support filed by Richardson and his firm (Doc. 133). The **Intervenors** were **DIRECTED** at the hearing to file notices with the clerk detailing specifically which documents they wanted sealed. Once they do that, if there are additional documents named which remain unsealed after entry of this order, the court will consider sealing the additional documents, m addition, the **CLERK** is **DIRECTED** to continue to include John D. Richardson, the law firm of Richardson, Spear, Spear & Hamby, P.C., Owen S. Posey P.E. and R. Harold Deese in this case for notice purposes.

It is **FURTHER ORDERED** that this matter is

APPENDIX H

REFERRED to the Magistrate Judge for the purpose of entering a scheduling order to allow the parties to conduct discovery solely on the new issues raised by the amended counterclaim.

DONE and **ORDERED** this 3rd day of March, 2004.

/s/ CallieV. S. Granade
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION
FILED SEPTEMBER 2, 2005

THE CINCINNATI INSURANCE CO.,)
Plaintiff,)
v. CIVIL ACTION 99-0552-WS-C
MATTHEW LEACH COCHRAN, et al.,)
Defendants.)

ORDER

This matter is before the Court on the defendants' motion in limine regarding certain of the plaintiff's expert witnesses. (Doc. 308). The plaintiff has responded, (Doc. 309), and the motion is ripe for resolution. After carefully considering the foregoing materials and other relevant materials in the file, the Court concludes that the motion is due to be granted in part and denied in part.

BACKGROUND

On the night of November 11, 1998, a fire damaged the premises of defendant Foreign Auto Parts of Mobile, Inc. ("Foreign Auto Parts"). Defendant Cochran, the business owner, acknowledges that he was in the building when the fire began but denies that he set it. A succession of individuals investigated the fire, with several concluding or supporting the conclusion that it was the result of arson. The plaintiff, which insured the premises, declined to pay and filed this declaratory action. The defendants counterclaimed, inter alia, for breach of contract and bad faith. The present motion seeks to exclude the testimony of seven expert witnesses for the plaintiff. The primary ground is the plaintiff's asserted failure to satisfy the requirements of Federal Rule of Evidence 702, as amplified by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and like cases. The motion includes additional, isolated challenges based on Rules 401,402 and 403.

APPENDIX I

[SKIPS TO PAGE 11-12 OF ORIGINAL ORDER]

4. Unfair prejudice.

The defendants argue that it is unfairly prejudicial to allow law enforcement witnesses, including Hansen, to testify without allowing the defendants to offer evidence that the prosecution of Cochran was abandoned after allegations concerning Deese's conduct in previous investigations came to light. The defendants argue that the presentation of such witnesses could encourage the jury to assume that Cochran "did something illegal," and that the defendants should be allowed to counter that impression by showing the ultimate fate of the prosecution. (Doc. 308 at 12-13).

On its face, the defendants' argument appears to be an effort to circumvent the Court's previous ruling that they may not present evidence of Deese's alleged past misconduct. (Docs. 276, 296). In any event, the defendants' previous motion to exclude the law enforcement witnesses, based on precisely the grounds now urged, was denied. (Doc. 273 at 7, ¶25; Doc. 274). As the Court has explained, (Doc. 302 at 3, ¶8), a prior ruling cannot be revisited simply because a different judge is now assigned to the case, and the defendants have offered no cognizable basis for entertaining what is effectively a motion to reconsider the earlier ruling. *See generally Mays v. United States Postal Service*, 122 F. 3d 43, 46 (11th Cir. 1997)(emphasizing the limited circumstances in which motions to reconsider are appropriate).

[SKIPS TO PAGE 17 OF ORIGINAL ORDER]

DONE and ORDERED this 2nd day of September, 2005.

s/ WILLIAM H. STEELE
UNITED STATES DISTRICT JUDGE

APPENDIX J

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEB 0 9 2007
THOMAS K.KAHN
CLERK

No. 05-16867-CC

THE CINCINNATI INSURANCE COMPANY,
Plaintiff-Counter-
Defendant-Appellee,

versus

MATTHEW LEATH COCHRAN,
FOREIGN AUTO PARTS OF MOBILE, INC.,
PROFESSIONAL ENGINE SERVICE, INC.,
Defendants-Counter -
Claimants-Appellants,

On Appeal from the United States District Court for the
Southern District of Alabama

Before: MARCUS, WILSON and HILL, circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellants is DENIED:

ENTERED FOR THE COURT:

/s/James Hill
UNITED STATES CIRCUIT JUDGE

ORD-41

APPENDIX K

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally.—Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused.—In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim.—In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness.—Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts.—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

APPENDIX L

IN THE CIRCUIT COURT FOR
MOBILE COUNTY, ALABAMA

DOUGLAS H. FERRYMAN, et al.,
Plaintiffs,

vs- CIVIL ACTION NO.
CV-00-3520

THE CINCINNATI INSURANCE
COMPANY, et al.,
Defendants.

****

DEPOSITION OF GERALD W. MADDOX, taken pursuant to stipulation and agreement before Lyn Daugherty, Certified Shorthand Reporter and Commissioner for the State of Alabama at Large, in the Offices of Haislip, Ragan, Green, Starkie & Watson, 566 South Perry Street, Montgomery, Alabama, on Saturday, May 10th, 2003, commencing at approximately 10:00 a.m.

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[SKIP TO PAGE 7 OF TRANSCRIPT]

Q. Mr. Maddox, where do you live?

A. I live at 779 State Highway 97 South, Highland Home, Alabama 36041.

Q. And by whom are you employed?

A. I'm employed by the State of Alabama.

Q. And what do you do for the State of Alabama?

A. I'm a deputy state fire marshal.

Q. And how long have you been a deputy state fire marshal?

A. Approximately 12 and a half years.

Q. What does the State Fire Marshal's Office do? What is its function?

A. Basic functions -- There's many functions. But they investigate fires, bombings, explosions, do code enforcement work. We 19investigate any and all crimes that's involved -- if we start working a case, whatever it leads into we work it.

Q. Are you a sworn police officer?

A. Yes, I am.

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Q. And do you have power of arrest?
A. Yes, I do.
.Q. And prior to your going to work for the State Fire Marshal's Office, what did you do?
A. I worked for the Montgomery Fire Department from 1970 to 1990, at which time I retired on a Friday and went to work for the State on Tuesday.
Q. And when you were employed by the Montgomery Fire Department, would you tell us -- I guess starting your last years and go backwards.
A. Okay. My last years --
Q. is that basically a resume you've got there?
A. Yes. If it would be all right with you --
Q. Could I just have that, please, sir?
A. Yes, sir.
Q. Is this a document that you prepared?
A. Yes.
Q. And it details your experience, does it not?
[SKIP TO PAGE 10 OF TRANSCRIPT]
Q. Does it detail certifications and awards and things like that that you --
A. Yes, sir, it does.
Q. Now, if you would, just for the record, tell us generally about your experience in investigating fires.
A. Okay. I've probably got approximately 20 years investigating fires.
Q. For the Montgomery Police Department—
Fire Department?
A. Montgomery Fire Department, yes, sir. I was an officer there from --in the arson unit from '83 to '90.
Q. And since then you've also done that with the State?
A- Yes, sir. I've done the same thing as I was doing with the City.
Q. Okay. And you --it looks like on this resume you've got a number of courses that you took over the years.
A. Yes, sir.

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Q. The Alabama Fire College; Hughes Institute, Electrical Fires For Nonelectrical Engineers; University of North Florida. And these were all through the Montgomery Fire Department?

A. Yes, sir. Most of them was, yes, sir.

Q. And --

A. Since I've been with the State Fire Marshal's Office, I've been to schools and so forth. But it's not an updated resume.

Q. And it looks -- you were at one time the captain of arson?

A. Yes, sir.

Q. And you were the - - I guess the responsible person for the arson investigation unit?

A. NO. We had a chief that was over me. I was the second in command.

Q. Now, we sent you a subpoena for this deposition, and I'm going to hand you a copy of that document.

A. Yes, sir. I received that.

(Plaintiff's Exhibit 2 was marked for identification.)

Q. And in – I'm going to mark this as Plaintiffs Exhibit 2 for purposes of this

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we was riding on the Northern Bypass, and we happened to go by the Spread - - I mean, was on the Northern Bypass, but the Spread is off of Twain Curve just like looking out -- well, it's actually to the right, but you could see it as you go by. And he seen a vehicle over there, and he said, that might be the fire investigator from Florida. And so he turned around and we drove up and there was a Jeep vehicle parked outside the front door of the Spread. And appearance into the Jeep showed it was a type --it had a Florida tag and it showed that it had the type stuff that you would normally find for a fire investigator, such as shovels and gloves and stuff like that. I can't remember everything that was in it, but it was what you would expect a fire investigator to have.

Q. And how -- Were you expecting some fire investigator?

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A. Yes- Chief Graham had told me that somebody was coming up from Florida, but I didn't know -- I didn't know when or whatever and neither did he.
Q. This was some 20 days after the fire?
A. 22, if I remember correctly. And we just happened to go by.
Q. And so you found the Jeep?
A. Yes, sir.
Q. Did you see anything in the Jeep that was unusual?
A. Yes, sir, I did.
Q. What did you see in the Jeep?
A. I seen up above -- and I don't remember what it was sitting on. But it was a quart Masonry jar, which contained an orangish liquid, about three-quarters of the way full. In that jar there was burnt residues is of wood and ash and it was kind of an orange color. And it was -- Like I said, it was ash, wood residue, little pieces of char -- what you'd call charcoal, like left over from a fire.
Q. And this was in the car?
A. It was in the Jeep.
Q. Okay. In the Jeep?
A. Uh-huh (positive response).
Q. Did you go into the building?
A. Yes, sir, I did.
Q. Did you find anyone in the building?
A. Yes, sir, we did.
Q. Who did you find in the building?
A. Mr. Deese.
Q. This gentleman that's here present today?
A. Yes, sir. I think me and him have both changed a lot, but that's him.
Q. And did he introduce himself to you?
A. Chief Graham.
Q. Chief Graham?
A. Yes, sir. I didn't talk to him.
Q. But you were there?

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A. Yes, sir.
Q. And what -- Did you hear him say anything to Chief Graham?
A. Yes, sir.
Q. What did you --
A.He showed Chief Graham where he took his sample. And during the discussion with Chief Graham, he told him --he said, I think the short -- the electrical short was caused by the fire. And Chief .Graham said, well, you know, there wasn't no power on. And he told Chief Graham he thought the power was on at the time of the fire, and Chief Graham explained to him that it wasn't.
Q. You said he had taken some samples?
A. Yes.
Q. Did he show you the samples?
A. I seen where he cut the sample.
Q. What did he tell you about the sample? What did he tell in your presence there at the scene?
A. What he said --He said that somebody had poured gasoline and -- around the baseboard in the hallway, which -- it's like there's the left hallway, depending on which way you're coming in, the hallway to the back.
Q. Did he have a sample of carpet?
A. I didn't see a sample, but I seen a can. I don't know what was in his can. I could just see where the carpet had been cut.
Q. You could see where -'-
A. A little piece of carpet had been cut.
Q. --a little piece of carpet had been cut out of the carpet on the floor?
A. Yes, sir.
Q. And he said that that was in the can, the sample?
A. He didn't say nothing about that. He just said that's where he took his sample. Somebody poured gasoline. I didn't see him take it, and he didn't talk to me.
Q. And that somebody had poured gasoline there?
A. Yes, sir.

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Q. And what did you do?
A. What did I do? I walked out of the building.
Q. Okay. Did you subsequently go back and take a sample of that area?
A. Yes, sir, I sure did.
Q. And did you turn that sample in to --
A. Yes, sir.
Q. -- have it analyzed?
A. I turned it in the same day.
Q. And what did the results of that sample show?
A. Gasoline.
Q. It showed the presence of gasoline --
A. Yes, sir.
Q. --in that area?
A. Yes, sir.
Q. Now, had you investigated that area of the building in your earlier investigation?
A. Yes, sir. What happened, when I walked in and started going down that hallway down there I smelled gasoline. I knew that wasn't right because there was large volumes of water was used the night of the fire and in the morning hours. I had walked all that area there. I was in there. And should gasoline had been used to set that fire, it didn't go with the patterns. The wall wasn't burnt. The fire department took the paneling off. You can see by the studs there was no fire there. Basically the place that wasn't burnt the least was where the gasoline was. The burn patterns of the fire started in the attic. And if I -- If gasoline would have been there, once that water and everything settled out, it wouldn't have settled in just one area and you wouldn't have expected to smell it strong because it would have been evaporated.
Q. After 22 days?
A. Yes.
Q. Now, the photographs that you took on the 29th, which – the one -- the photograph which I had previously marked as Plaintiff's Exhibit 5, this photograph here --

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A. Yeah.
Q. --is this -- is that the area where the
20sample --he said he took the sample?
A. Yes, sir.
Q. All right. And if gasoline had been used to start a fire, would those studs have burned?
A. Yes, sir.
Q. Those studs do not show any evidence of fire, do they?
A. No, sir. Neither does the rat seal.
Q. All right. And this other photograph here --
A. That just shows you -- That just shows the wall down there where they had took the paneling off and make sure there wasn't no fire in the wall on the opposite side.
Q. And the photograph that has you in it, which I marked as Exhibit 8, that's the same area where Mr. Deese said he had taken his sample?
A. Yes, sir. And I cut a little small piece off just by it. If you look at it, those two photographs are different.
Q. All right. And so the photograph --
A. The photograph with me in it was taken after I took my sample.
Q. The photograph that shows you in the photograph --
A. Yes, sir.
Q. -- Number 8, is after you had taken your sample?
A. Yes, sir. If you look, you'll notice that those two pieces of carpet are not the same. I mean, it was soaking in gasoline. You didn't have to get but just a touch.
Q. Okay. Now, after you got the report from the lab concerning the presence of this gasoline in that sample, did you reach any conclusion as to what had occurred?
A. Yes/sir. I knew what occurred when I walked in the building.
Q. What had happened?
A. Somebody put that gas after the fire.
Q. And who would that person, in your opinion, be?
MR. SPEAR: Object to the form.

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A. Well, I did not see the man put the gas in the scene. He took the sample from the scene. It was fresh gas. Shouldn't have been there.
Q. And that would be Mr. Deese?
A. Mr. Deese took the sample, yes, sir.
Q. Now, if you would, you prepared a report, did you not --
A.I did.
Q. --of this incident?
A. I did.
Q. And is that -- That's in this file?
A. Yes, sir.
Q. And if I look at the file, the first document I see is a two-page report signed by Lieutenant G.W. Maddox?
A. That's me, yes, sir.
Q. That's you?
A. Yes, sir.
Q. This is your report?
A. Yes, sir.
Q. Did you prepare this yourself?
A. Yes, sir, I did.
Q. And you prepared it about the time of this incident?
A. Yes, sir.
Q. To the best of your knowledge, it reflects the events that occurred at that time?
A. It's a basic -- basically covered the events of that time, yes, sir.
Q. After you got the report from the state lab that gasoline was present, did you do anything further?
A. Yes, sir, I did.
Q. What did you do next?
A. Okay. I was concerned about the gas being there and being taken and what I seen in the Jeep. And as I stated prior, I didn't speak to Mr. Deese, because when I walked in the building, I knew something was wrong. I was mad. I walked outside. I didn't speak to him after he had told --made a little small conversation with Chief Graham, what I had testified

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to. And then I just went outside. Well, from that point on, I had contacted USF & G.

Q. Why did you contact USF & G?

A. I wanted a copy of his report; okay?

Q. Okay.

A. I believe that two subpoenas were served on him. Later on in '87 after numerous phone calls and conversations with Mr. Miller, I personally served a subpoena on Mr. Miller.

Q. And Mr. Miller was who?

A. He was one of the --He was over the Montgomery office.

Q. For USF & G?

A. Yes, sir.

Q. USF & G was the insurance company --

A. Yes, sir.

Q. -- that insured this loss?

A. Yes, sir.

Q. Let me show you a letter dated April 16, 1987 --

A. Yes, sir.

Q. -- addressed to Mr. Owen C. Miller. Is that a letter that you wrote him?

A. Yes, sir. As I had stated, you know, there was going to be some problems with the rank and all because I had been promoted at that time. That's what I was talking about before when we was talking about --

Q. Right. But you wrote him this letter on or about April 16 of 1987?

A. Yes, sir. I didn't get a response.

Q. In that letter did you request his reports?

A. Yes, sir.

Q. And you didn't get a response?

A. No.

Q. Did you subsequently serve a subpoena on him?

A. Yes, sir, I did.

Q. And in this file the last piece of paper I found in it is a --

A. Okay. That's not my doings. That's Chief Charles Kelly, who was a chief investigator at the time, that's his write-up to

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get the first subpoena.
Q. Okay. He wrote up a request for a subpoena?
A. Yes. For me. He was the chief at the time.
Q. Okay. And then subsequent to the document I'm looking at here, you actually went out and served a subpoena on USF & G?
A. It would be after -- not that document. I mean, it would be after that document there, yes. It would be after the letter and phone calls I had made. It would have been sometime in the summer of '87, the early summer. I don't remember exactly what date.
Q. And when you served the subpoena on Mr. Owen, what then happened?
A. What happened? That same day Jimmy Graham -- who was the captain, was now the chief --he got called downtown. And he come back and he told me that the chief had received a complaint the way that I was trying to get information from USF & G; I wasn't going to get no records; and I was relieved of any investigations to do with that fire and that attorney by the name of Mr. Richardson would make contact with Chief Graham and set up an appointment to meet with me.
Q. Did you ever talk with Mr. Owen about this incident?
A. No. Huh-uh (negative response). I wasn't --
Q. Did you subsequently talk to Mr. John Richardson about this incident?
A. I did.
Q. Tell us about that.
A. At that time my office was on Highway 80, Station 14. We had a substation out there. Mr. Richardson came out there and met with myself. Chief Jimmy Graham. I explained to him what I thought had happened.
Q. Let me ask you this first: Did he bring anybody with him?
A. I believe somebody was with him, but I can't swear to it and I can't remember who it was.
Q. And he identified himself as John D. Richardson?

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A. Yes. Yes.
Q. Had you ever met him before?
A. No, sir.
Q. Now, tell us what you said to Mr. Richardson and what Mr. Richardson said to you.
A. Okay. Basic conversation was myself and Chief Graham explained just what I've testified here to. Told him that we had a problem and what I was doing was in the process of trying to get the records to show the correlation from Mr. Deese working for USF & G and what -- how his reports were coming back positive for whatever and I was trying to build the case and show that at the time. And I told him what happened at the Spread and what we was doing. And he talked to us and tried to -- you know, he was nice. And basic thing that -- you know, he said he didn't know about anything like that, never had before and so forth and that he wouldn't use Mr. Deese again.
Q. And --
A. His law firm wouldn't use him is what he said.
Q. And did you come across Mr. Deese again in the Montgomery area?
A. Not during my time with the Montgomery Fire Department.
Q. Now, did you explain to Mr. Richardson your conclusion that you had reached with respect --
A. Yes, sir, I did.
Q. And this transcript that you have from this testimony of this case in 1985 --
A. Yes, sir.
Q. -- where did you get that?
A. Well, I got that from the Mobile Fire Department. They mailed it to me. And as I stated, after that I had never met Mr. Deese, never heard nothing about Mr. Deese. And --
Q. But you did receive this --
A. Yes.
Q. -- during the time of your investigation?

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A. During my investigation, yes, sir.
Q. And after you had the conversation with Mr. Richardson, there was no further investigation, to your knowledge?
A. On my part, no. Because the chief had sent word through my boss man that I was no longer to be involved.
Q. Okay. Was --To your knowledge, was there any further investigation at all?
A. I think that was it as far as that – that was the end of it.
Q. Now, during the time that you observed Mr. Deese, did he indicate to you that he knew what an arson scene should look like?
A. As I stated, I didn't have any conversation with him.
Q. In his mannerisms and what he told Chief Graham?
A. Chief Graham, yes.
Q. And do you recall him making any statement at the time that y'all were out there at the scene of the lounge fire as to who he was working for?
A. No, sir. Of course, you know, we had been told prior that the insurance company was sending somebody, but I didn't know who --
Q. But you had a record, I guess, at that time that USF & G was the insurance company?
A. Yes. But I -- As I stated that Lieutenant Brown was the case officer and I had –it was in the case file. But to that time the insurance company was no concern of mine at that time.
Q. To your knowledge, did the USF & G insured get paid as a result of this fire?
A. To my knowledge, yes, sir.
Q. What did you have to do to prepare for today's deposition?
A. What I had to do to prepare for today's deposition?
Q. Yes, sir.
A. I had to go get a copy of this here from the Montgomery Fire Department. I had to review my notes, look over my pictures. And I had -- The main thing I had to do was get a subpoena. And I'm here today reluctantly. But I got a subpoena. I have no choice but to come here and tell the

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truth.

Q. And we've agreed to reimburse you for certain expenses today, have we not?

A. Yes, sir.

Q. And other than that reimbursement of expenses, have you been promised anything?

A. No, sir, I have not. I think I've talked with you two times.

Q. Right.

A. And you called me, I think.

Q. And you also came in on Saturday?

A. Yes, sir.

Q. Which we thank you for. Have you been qualified as an expert witness --

A. Yes, sir, I have.

Q. --in litigation?

A. Yes, sir.

Q. Approximately how many cases have you testified in?

A. Oh, I couldn't tell you that. I mean, I've testified in -- It would be hard to tell you because most cases never go to trial. But, you know, you testify in grand jury, preliminary hearing. Most of the time they plead out. I couldn't tell you that.

Q. But have you --

A. In the last --In the last year or so, I've testified three times as an expert – in the last two years, I think.

Q. Now, let me ask you this: Does the state fire marshal keep statistics of fires and any kind of percentage of what kind of fires would be suspicious, what fires would be arson, what fires would be accidental or --

A. Yes, sir. They have a record.

Q. Do you keep up with that?

A. No, sir.

Q. Do you have any judgment as to the number of fires that you've investigated over your career as to how many of them might be, quote, suspicious or arson as opposed to accidental?

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A. In our line of business with the State Fire Marshal's Office/most of the time when we receive a report, somebody thinks it's suspicious. But by it being suspicious don't mean that a crime had been committed. Most of the time they work out -- either we can't determine, it's accidental. The percentage of them probably being known to be a set fire would probably be low.

Q. Would you venture your best judgment as to a percentage?

A. I would just estimate probably a percentage I worked would probably be less than 20 percent that would be determined to be -- and I can't -- that's just an estimation, you know, because I don't keep any records of how many cases and what they are and so forth. Now, you know, my office may be able to give you that information.

Q. Based upon your investigation, training and experience, after you did your investigation of what you saw on August the 29th, did you reach a conclusion that Mr. Deese had attempted to alter the fire scene?

MR. SPEAR: Object to the form.

Q. You can answer the question.

A. Did I reach that objection?

Q. Conclusion, yes, sir.

A. Yes, sir, I did.

Q. And did you also reach the conclusion, based upon your investigation, training and experience, that Mr. Deese had brought gasoline to the scene and poured it on the carpet samples?

MR. SPEAR: Object to the form.

A. I believe that, yes, sir.

Q. And what was unusual about the fact that you saw this gasoline or a colored liquid in the car?

A. Well, what was unusual about it, I didn't know what it was. What was usual about it, why would some liquid have charcoal, burnt ashes, fire debris, what would be burnt wood and stuff in a jar with a liquid that resembled an off shade of

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gasoline.

Q. In other words, it was the presence of the debris?

A. And it sitting up there. And also I had a problem with Mr. Deese taking the sample.

Q. And what was that problem?

A. Because if I come to a scene and it was 22 days after a fire and I had brought gasoline, I wouldn't take no sample. I would leave because I wouldn't work the scene because somebody tampered with it.

Q. Now, based upon your experience, training and investigation, would you trust Mr. Deese's opinion as an expert?

MR. SPEAR: Object to the form.

A. I had rather not answer that. But if you ask the question and I have to do it --

Q. Yes, sir.

A. -- what I have read about Mr. Deese in this document right here alone I would not trust his word on anything.

Q. And that you're referring to the transcript?

A. Yes. I think let the transcript speak for itself.

Q. Can you think of any other responsible explanation as to how the gasoline got on that carpet at the Spread Lounge other than through Mr. Deese?

A. I'll state today, as I put in my thing, that that gas was put there. Mr. Deese took the sample. The case is -- will speak for itself.

Q. Now, is there anything that -- about this incident or about Mr. Deese of which you are aware that I haven't asked you about today?

A. I'm strictly talking about this case that I worked that I know to be a fact, and I'm not going to get off anything of hearsay. I'm sticking strictly with the facts that I know to be the truth, and that's all I'm testifying to.

Q. Did you reach any conclusion as to what the liquid in the car was used for?

MR. SPEAR: Object to the form.

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A. I have an opinion, yes, sir.
Q. What is that opinion?
MR. SPEAR: Same objection.
A. Just -- The judge ain't here. I'll answer. The reason it was done – The reason that you would put fire debris in gasoline so that it wouldn't -- you would reduce the high ratio of the gas once it was sent to the lab. It would – They would expect to find some debris or something in the -- you know, they wouldn't expect to find just raw gas every time.
Q. Okay. So when the lab does what they do, they -- if it's from a fire scene, they would expect to find debris in the --
A. Well, they would expect -- Well, I wouldn't say they would expect to find debris, because there's times that raw gas is poured. Do you understand what I'm saying?
Q. Right.
A. Sometimes raw gas is poured. But if you took a sample, if it had this in it, then it would --it would change the gasoline to a point where it would make it like older gas.
Q. Okay. And that's based on your experience and training -
A. Well, that --
Q. -- that conclusion?
A. That's -- That's what happens.
Q. Right. And that's what you've seen?
A. Yes.
MR. BROOKER: That's all.

EXAMINATION
BY MR. SPEAR:
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This 12th day of May 2003.

/s/Lyn Daugherty
Lyn Daugherty,
Certified Shorthand Reporter
And Commissioner for the
State of Alabama at Large

APPENDIX M

AFFIDAVIT OF PERRY MATTHEWS

Before me, the undersigned authority, personally appeared PERRY MATTHEWS who, being first duly sworn, did depose and say as follows:

1. I am the Chief of Police for the City of Chickasaw, Alabama.

2. In 1991, I was a Sergeant with the City of Chickasaw Police Department, a fire fighter and the arson investigator for the City of Chickasaw. At that time, I had been a police officer and trained to fight fires for approximately twelve (12) years.

3. On February 16, 1991, there was a fire at 502 Woodlore Drive, Chickasaw, Alabama 36611, and I along with other fireman fought the fire, as well as work the area around the heater inside the home.

4. That same night after the fire, I also examined the premises and the heater thoroughly but did not find any circumstances which I felt were suspicious.

5. Several days after the fire an investigator named Harold Deese came by my office and showed me fat lighter wood that he claimed he had gotten from inside the heater at the fire scene. Harold Deese claimed he found the wood stacked in a pile under the center of the heater on the floor.

6. I do not have any doubts about the fact that the wood was not in that heater at the time of the fire or immediately thereafter. I had closely examined the heater the night of the fire from all angles with the aid of a 25,000 candle power hand held light and found no fat lighter wood. Further, the same area Harold Deese claimed to have found the wood in a pile under the heater was exposed to water from a straight stream of an inch and a half line resulting in approximately 200 pounds per square inch of pressure, therefore, it would have blown out.

7. The home involved in the fire was not the subject of any subsequent arson investigation by the City of Chickasaw.

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Further affiant says not.

/s/ Perry Matthews
PERRY MATTHEWS

SWORN TO AND SUBSCRIBED BEFORE ME THE UNDERSIGNED NOTARY PUBLIC ON THIS THE 9 DAY OF MARCH 2005

/s/Vivian W. Jackson
NOTARY PUBLIC

My commission expires 12-5-05

APPENDIX N

AFFIDAVIT OF GEORGE N. HARDESTY, JR.

Before me, the undersigned authority, personally appeared GEORGE N. HARDESTY, JR., who, being first duly sworn, did depose and say as follows:

1. My name is GEORGE N. HARDESTY, Jr.and I am a District Judge in Mobile County, Alabama and I make this affidavit of my own personal knowledge.

2. Prior to being appointed to the District Judgeship, I was employed by the Mobile County District Attorney's office as an Assistant District Attorney. In that capacity, I was assigned to prosecute the case of State of Alabama v. Matthew Cochran. Mr. Cochran was charged with Arson 2nd Degree. I investigated the case and prepared the case for trial. I interviewed the witnesses and reviewed the documents and evidence in the case. The case was originally tried to a jury and the judge declared a mistrial because the jury was unable to reach a verdict in the case.

3. The case was set to be retried. Pursuant to negotiations with Mr. Cochran's attorney, an agreement was reached wherein Mr. Cochran would stipulate to a prima facie case of Arson 3rd degree (misdemeanor) and in exchange for the stipulation, the state would recommend a sentence which would include one year suspended for two years, informal probation, no fine, no restitution and court cost.

4. Mr. Cochran, through his attorney of record, expressly denied any involvement in the cause and origin of the fire and he did not enter a plea of guilty or otherwise make an admission against his interest.

5. In preparing the case for trial, I had numerous conversations and exchanged correspondence with R. Harold Deese, who was presented to me to be an expert in the cause and origin of fires. I understood that Mr. Deese had been hired by the insurance company, or the law firm representing the insurance company, to investigate the fire. Mr. Deese

removed and analyzed much of the evidence from the scene of the fire. In addition, he submitted reports of the results of his investigation and photographs of the fire scene and he actively participated in assisting in the prosecution of the case. While preparing for the second trial, I received correspondence from Mr. Deese wherein he offered to perform a test before the jury, which he indicated would prove that the fire could not have started in the manner claimed by Mr. Cochran.

6. A significant portion of the evidence that the state relied upon in the prosecution of Mr. Cochran originated directly or indirectly from the investigation which was conducted by Mr. Deese. The prosecution relied heavily on the physical evidence provided by Mr. Deese along with his "expert opinions" regarding that evidence as it relates to causation of the fire.

7. In May of 2003, I was contacted by Mr. Cochran's attorney and he provided me with a copy of assistant state fire marshall Gerry Maddox's deposition transcript that was given in that case, the affidavit of Jimmy Remanauskis and the trial transcript of Harold Deese testimony given in a civil trial in Mobile County in 1985.

8. After reviewing the depositions of Mr. Maddox and Mr. Deese, the affidavit of Jimmy Remanauskis and the transcript of the trial testimony of Harold Deese, and considering this information along with the other evidence in the district attorney's file, I am of the opinion that had I known or been aware of this information at the time of Mr. Cochran's criminal case, I would have been compelled to disclose this information to the attorney representing Mr. Cochran. This information, had it been known by me at the time, would have very likely influenced my decision to prosecute the case and/or to call Harold Deese as a witness.

/s/George N. Hardesty, Jr.
GEORGE N. HARDESTY , JR.

APPENDIX N

SWORN TO AND SUBSCRIBED BEFORE ME THE UNDERSIGNED NOTARY PUBLIC ON THIS THE 20TH DAY OF MAY, 2003

/s/ Sharon K. Nelson
NOTARY PUBLIC
My commission expires 12/5/05

APPENDIX O

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

THIRTEENTH JUDICIAL CIRCUIT

MATTHEW L. COCHRAN,
Petitioner,

v- CC-99-1198.60

STATE OF ALABAMA,
Respondent.

STATE' S RESPONSE TO RULE 32 PETITION

Comes now the State of Alabama and files this response to the Petitioner's Rule 32 Motion.

I.

PROCEDURAL BACKGROUND

The Petitioner was originally tried on a charge of Second Degree: Arson. However a mistrial was declared on November 6, 2000 when the jury was unable to reach a verdict. On November 26, 2001, the Petitioner pled guilty to the misdemeanor charge of Third Degree Arson. He stipulated that the state could prove a prima facie case/ but, admitted no wrong doing. The Petitioner was sentenced to one year suspended for two years of informal probation. This is his first application for post-conviction relief under Rule 32.

II.

PETITIONER'S CLAIMS

The Petitioner seeks to set aside the conviction in the above cases on the grounds that 1) there was no plea colloquy and he was not informed of the nature of the charges, 2) there was no explanation of rights and waiver form, and 3) that there are newly discovered material facts that require the conviction be vacated.

III.

STATE' S RESPONSE TO CLAIMS

The State denies the Petitioner's first two claims and

asserts that they are meritless. The Petitioner and his attorney signed a Notice of Intent to Plead Guilty form. This form included the amended misdemeanor charge along with the required element that he recklessly maintained a fire. The State maintains that the Petitioner was well informed as to the charge against him and that his stipulation was made intelligently and voluntarily.

Petitioner's third and final claim that there are newly discovered material facts does have merit. It has come to the State'3 attention that the credibility of the arson investigator, Harold Deese, has come into question. Mr. Deese has apparently himself been the center of investigation based on his falsifying evidence of arson. While there is no direct evidence that Mr. Deese acted improperly in this particular investigation, his credibility is such that George Hardesty, the former prosecutor who tried the case, now says that he would not have tried the case at all had he known about Mr., Deese's unethical activities. Attached to this answer are affidavits from the parties involved in the prosecution of Mr. Cochran as well as the investigation of Harold Deese.

The State does not appose this Rule 32 Petition being granted and the conviction set aside. In the event that this Rule 32 Petition is granted, the State does not intend to re-prosecute Mr. Cochran.

Respectfully Submitted,

/s/Nicole Giardina
Nicole Giardina
Assistant District Attorney

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon the Petitioner this date: 1/30/04.

/s/Nicole Giardina
Nicole Giardina
Assistant District Attorney

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JUN 18 2007
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SUPREME COURT, U.S.

No. 06-1528

IN THE

Supreme Court of the United States

MATTHEW LEATH COCHRAN, FOREIGN AUTO PARTS OF MOBILE, INC., and PROFESSIONAL ENGINE SERVICE, INC.,

Petitioners,

v.

THE CINCINNATI INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS AND STATEMENT PURSUANT TO RULE 29.6

There are no additional parties to the above styled action other than Petitioners, Foreign Auto Parts of Mobile, Inc., Professional Engine Service, Inc. and the Respondent, The Cincinnati Insurance Company.

The Cincinnati Financial Corporation is the parent corporation of The Cincinnati Insurance Company. No publicly held corporation owns 10% or more of The Cincinnati Financial Corporation's stock.

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STATEMENT OF THE CASE

A. Procedural History

In 1999, The Cincinnati Insurance Company (Respondent) filed a declaratory judgment action which sought to void the policies of insurance issued to Foreign Auto Parts of Mobile, Inc. and Professional Engine Service, Inc. (Petitioners) based on the arson and misrepresentation of Matthew Cochran (Cochran) [R1]. The case proceeded and in November of 1999, Cochran filed the first counterclaim against Respondent for breach of contract [R17].

In June of 2000, the proceedings were stayed pending the conclusion of Cochran's criminal trial for second degree arson regarding the fire at issue [R23]. The stay was lifted in December of 2001 [R27], the case proceeded. Respondent amended its complaint to add Petitioners as defendants [R47]. Summary judgment was granted in favor of Respondent in May of 2002 [R31, R.32, R 34, R35 and R37].

Pursuant to the District Court's request in December of 2002, Respondent filed a status report detailing the pending summary judgment claims [R66, R67 and R68] and Petitioners responded [R69]. A series of motions were filed by Petitioners [R70, R71, R73 and R78] which were all denied by the District Court; however, the Court allowed Petitioners to again file an amended answer or counterclaim [R84]. For the third time discovery was reopened and new deadlines were set [R84]. Petitioners again amended the counterclaims which alleged breach of contract, bad faith, misrepresentation, conspiracy and spoliation of evidence [R87]. After various filings, the District Court granted, in part, and denied, in part, Respondent's motion for summary judgment [R90, R91 and R116] and dismissed the counterclaims of misrepresentation and spoliation of evidence [R116].

On December 2, 2003, the District Court set the matter for a pretrial conference and a trial date of March 2, 2004 [R119].

The parties filed a jointly prepared proposed pretrial report on January 23, 2004 [R120]. Shortly thereafter, Respondent filed a motion to strike various triable issues set forth by Petitioners in the proposed pretrial order [R121]. Respondent argued various triable issues were not previously pled and were not the subject of discovery in the matter. Although Cochran pled guilty to 3rd degree arson, his conviction was not set aside until January 30, 2004, in light of a Rule 32 motion filed by the State of Alabama [R123, P. 9-11].[1]

On February 2, 2004, a pretrial conference was held [February 2, 2004 Minute Order] wherein Judge Hand required documentation as to the status of the criminal case and also allowed Petitioners to once again amend, for the third time, their counterclaims for clarification, in particular the allegations of conspiracy due to the contents of Petitioners' proposed pretrial order previously submitted [R122]. The case was stayed once again [R122]. In February of 2004, Petitioners amended their counterclaims which alleged new facts to support the same theories of conspiracy but it also included a newly pled counterclaim of malicious prosecution [R124]. The attorneys representing Respondent's at that time had no choice but to withdraw as counsel since the new allegations claimed the attorneys were part of conspiracy to deny insurance coverage [R135 and R136].

On March 3, 2004, the District Court referred the matter to a magistrate judge for the entry of a scheduling order for

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1. The basis of the Rule 32 motion was an affidavit provided by the previous prosecutor, George Hardesty, Jr. and information/documents provided to him by Cochran's attorney regarding Respondent's cause and origin expert, Harold Deese [R123, P.7-8]. Contrary to the assertion of Petitioners, Hardesty's affidavit is void of any affirmative statement that Hardesty definitely would not have tried the case at all had he known about the allegations of Deese's claimed unethical activities. The affidavit does state that had the information been known to him at the time it "would have very likely influenced" his "decision to prosecute the case and/or to call Harold Deese as a witness." [R123, P. 7-8].

discovery solely on the new factual issues raised in the amended counterclaims filed by Petitioners [R138]. By order of August 4, 2004, the District Court denied Petitioners' new motion for leave to amend their counterclaims to add co-conspirator defendants and new RICO claims [R 172 and R179]. On August 23, 2004, yet another scheduling order was entered.[2] [3] [R184]. On September 29, 2004, Respondent filed a motion to clarify [R194] the District Court's order of February 9, 2004 [R122] wherein Respondent questioned whether the newly added malicious prosecution counterclaim fell within the scope of the court's previous order which allowed for the amendment to the counterclaims on a limited basis [R194]. The purpose of court's order [R122] was to allow Petitioners the opportunity to clarify the allegations contained in the proposed pretrial order [R120] which was filed on January 23, 2004, particularly the conspiracy allegations, by amending their counterclaims. Petitioners filed a response in opposition based on the timeliness of the motion to clarify [R210].

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2. The discovery process was protracted and highly contentious. Petitioners filed discovery requests and motions compelling discovery that flatly were extremely unreasonable, untimely, contrary to the District Court's Orders staying discovery and that failed to comply with the FRCP. [R181; R184; R192; R193]. For example, Petitioners sought to compel depositions of Respondent's CEO before actually noticing it. For another example, Petitioners filed a motion to compel discovery when discovery was stayed. In these instances and others, Respondents and non-parties had to seek court assistance to stop Petitioners' discovery abuses.

3. Due to the abuses in the discovery process by Petitioners, on November 29, 2004, the District Court affirmed its prior order imposing monetary sanctions against Petitioners' counsel [R215 and R247]. Petitioners' counsel was also sanctioned in the U.S. District Court, Northern District of Florida, Panama City Div., Case. No. 5:05cv93/RV/MD regarding Petitioners' issuance and attempted enforcement of an invalid and patently unreasonable non-party subpoena to Harold Deese. Petitioners' counsel appealed the sanctions but this Court recently denied said Writ; specifically Case No. 06-1310.

On October 18, 2004, the District Court granted the motion to clarify by finding that: (1) Petitioners only attempted to object on the grounds that the motion to clarify was untimely; (2) Petitioners' "slight of hand" inclusion of the malicious prosecution claim in the amended counterclaim was outside the scope of what the court allowed in its previous order; and (3) that at the time of the filing of the proposed pretrial order on January 23, 2004, Matthew Cochran's criminal conviction had not yet be overturned so a malicious prosecution claim would not have been ripe for adjudication. The court struck the malicious prosecution claim [R216]. Petitioners requested the District Court to reconsider said order, or in the alternative, motion for leave to again amend the counterclaim [R226] which was denied [R228].

On March 1, 2005, Petitioners filed a Motion *In Limine* seeking to preclude any reference to the criminal investigation of Matthew Cochran [R 273].[4] Petitioners claimed evidence regarding any criminal investigation would "greatly protract the trial proceedings and be nothing more than a side show" for Respondent and would cause undue delay and waste of time. [R273]. The District Court granted, in part, Petitioners' motion insofar as it sought to preclude any reference to the fact that a criminal investigation was undertaken. Petitioners' motion was denied, in part, insofar as it sought to preclude testimony regarding evidence gathered during the course of the investigation that was relevant to the issues in this case, including whether the fire was caused by arson. [R274].

On March 7, 2005, the District Court granted Respondent's Motion *In Limine* [R240] precluding mention of the Spread Lounge fire, Deese's alleged altering of fire scenes/evidence and Attorney Richardson's knowledge of the Spread Lounge

4. Petitioners' Writ insinuates that an adversary ruling was made against them in denying their ability to present evidence regarding the outcome of the state criminal prosecution of Cochran. [Writ, p. 6]. The record is clear that the District Court granted Petitioners' own motion to exclude any mention of the criminal prosecution. [R274]

fire [R276]. Only after the entry of the court's order, Petitioners filed an objection [R281] to Respondent's motion limine regarding alleged prior bad acts of Harold Deese [R240].

On March 9, 2005, Petitioners filed a motion to amend/ correct [R282] the proposed pretrial order [R252] to include alleged newly discovered evidence and witnesses regarding allegations of Harold Deese altering fire scenes/evidence. The District Court, on April 15, 2005, entered an order which affirmed its prior order on the Spread Lounge fire [R276], granting Respondent's motion in limine [R286] regarding the 1991 Chickasaw fire and denied Cochrans' motion to amend/ correct [R282] the proposed pretrial order [R297]. In October of 2005, the District Court ruled that Matthew Cochran was not a proper counterclaim plaintiff and that Cochran could not maintain any alleged counterclaims against CIC. The order did not affect the claims pled by Petitioners [R337].

B. Statement of the Facts

The entirety of this brief could be consumed by corrections to all of the misstatements and mischaracterizations of facts contained in Petitioners' Writ. Portions of the Statement of the Case are correct but Petitioners take liberty with the facts and twists the actual facts into sinister allegations with self-serving commentary. Therefore, Respondent presents the following:

Respondent issued two fire insurance policies to Foreign Auto Parts of Mobile, Inc., providing coverage for the building, business personal property and loss of business income and a third policy to Professional Engine Service, Inc., regarding coverage for contents [R297, P. 2]. Matthew L. Cochran, the owner and officer of the two corporations, is not a named insured on the policies of insurance involved in this suit [R297, P. 3].

On November 11, 1998, a fire occurred at the location of 713 Holcombe Avenue, the site for Foreign Auto and Professional Engine. Both businesses are located under the same roof and the fire caused significant damage and loss to the

structure and the personal property located within the building [R297, P. 2-3].[5] The Court, in denying Petitioners' Motion for New Trial, concisely summarized the evidence before the jury:

> The critical factor in this case is the overwhelming evidence that defendant Cochran set the fire that damaged his businesses. The Court will not regurgitate details by now long familiar, but suffice it to say that an army of lay and law enforcement witnesses laid to bare Cochran's motive to commit arson, his intention and planning to do so, and his conduct - starkly inconsistent with innocence - on the night of November 11, 1998. Cochran did not aid his cause by offering flimsy explanations and bald denials of the wealth of evidence against him, nor by claiming to have witnessed a sudden burst of flame that even his own expert could not accept. His effort to turn the case into a battle of experts foundered on its own inherent implausibilities and could not in any event erase the mountain of damming evidence presented by disinterested witnesses.

[R366, P. 8-9].

The Jury had before it evidence of very serious and severe financial problems of the business as outlined by accountants - one hired by Cincinnati and one by Cochran [R383, P. 693: 9-23; R383, P.725:20 through P. 727:15; R385, P. 1038: 19-25; P. 1039: 1-8; P. 1041: 9-12; P. 1042: 2-17]. During the time of financial difficulty, Cochran told an employee that if business did not improve there would need to be a fire that would appear electrical with mainly smoke damage so that he would still have

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5. Prior to any determination of the cause of the fire, Respondent paid unto Cochran expenses incurred by him for the clean up of the property, security for the premises and payroll [R383, P. 719: 3-7] and also paid two mortgage holders for fire damage [R383, P. 761: 16-25; P. 717: 1-15].

the business but be able to get new inventory because the existing inventory was obsolete and Cochran could not sell it [R381, P. 249: 7-12]. Cochran inquired if this person knew someone to possibly burn the building [R381, P. 248:20-24]. Shortly thereafter, the fire occurred [R380, P. 196: 17-21].

Cochran testified that he was dropped off at his office by an employee on the night of the fire to get his wallet, that he was alone in the building at the time fire and that he actually retrieved his wallet. [R380, P. 202: 10-18; R380, P. 203: 10-25; P. 204: 1-7; R383, P. 729: 7-14; R383, P. 730: 11-23; R383, P. 729: 25; P. 730: 1-3, 20-22; R383, P. 732:1; R383, P. 735: 5-10; R383, P. 736: 1-10]. As Cochran entered the room where the fire originated, he slapped the light switch and immediately observed sparks below or behind a desk. [R383, P. 735: 5-10; R383, P. 735: 19-25; P. 736: 1-10]. This spark allegedly developed into a flame that quickly climbed the wall behind the computer desk [R383, P. 737: 10-13]. Cochran claimed it was an electrical fire which spread rapidly, which according to his own expert, could not occur in an electrical fire [R383, P. 737: 18-22 and R386, P. 1376: 20-25; 1377: 1-11]. Cochran also claimed he neither noticed anything suspicious nor did he smell smoke the entire time he was walking inside the building [R383, P. 733: 14-22; P. 738: 5-8]. Testimony from Cincinnati's experts indicated, based upon the soot built up on the light switch, that the switch had not been turned on at the time of the fire, contrary to Mr. Cochran's testimony. [R382, P. 477: 17-25; P. 478: 1-12].

Evidence also shows that there were large quantities of accelerant in the form of medium petroleum distillates in the building that were readily available for someone to use to set the fire [R380, P. 224: 22-25; P. 225: 1-14]. Cincinnati's experts and the Assistant State Fire Marshal, Hansen of the City of Mobile Fire Department, opined that the fire had multiple points of origin and was intentionally set by using medium petroleum distillates [R381, P. 326:17-23; P. 327:15-18; R382, P. 490: 7-24].

Additionally, Leonard Burroughs, a lay witness, who did not know Cochran, unsuspectedly came upon Cochran just when the fire became involved. [R380, P.125:14-18]. Burroughs drove past Foreign Auto, saw black smoke and rolling flames in the building of Foreign Auto and turned back around at the intersection to see if the business was actually on fire [R380, P. 118:15-20; 119:17-20; R380, P. 121:7-9]. Burroughs then saw Cochran coming toward him from a side street [R380, P. 120:7-10; R380, P.125:14-18]. Cochran would have had to exit the rear of his building (which he says he did – meaning he had to run through the building, pass a wall that was on fire to the rear of the building – rather than going out the front door which was a closer more direct path and walked through some woods behind several other businesses) in order to come out in the area of this side street [R383, P. 740: 21-25; P. 741: 1-13]. Burroughs asked Cochran if he knew the building was on fire and if he had called the fire department and Cochran indicated "yes" to both questions [R380, P. 121:17-19]. Burroughs testified that Cochran was sweating and was shocked to see him [R380, P. 122:18-21]. Burroughs observed Cochran walk about a block down the street away from the burning building and get into a truck that drove off away from the fire [R380, P. 121:19-23]. Although Cochran claimed that he ran from the building and down the street, Burroughs observed Cochran walking the entire time [R380, P. 121:11-14; R383, P. 742: 4-7].

Burroughs flagged down a police officer and advised what he observed and the police officer followed the truck Cochran was riding in as a passenger [R380, P. 123:21-25; P. 124:4-8]. The police officer turned on his lights to stop the truck [R380, P. 146:5-7]. The driver made two quick evasive maneuvers in order to avoid the police officer [R380, P. 146:8-20]. This was not only observed by the police officer but also testified to by driver who indicated that he turned down a street to see if the police were really after him [R380, P. 207: 25; P. 208: 1-7]. The truck was searched by the police and two cell phones were found

[R380, P. 148:22-25]. The cell phones belonged to Cochran and his business [R380, P. 205: 7-14]. Cochran was carrying one of the cell phones that night [R383, P. 745: 3-4]. Neither cell phone was used to call the police or the fire department [R383, P. 744: 21-25; P. 745: 1-7]. Even though the sole reason he went back to the office was to get his wallet, Cochran did not have his wallet when the police searched him [R380, P. 175: 1-9; R383, P. 735: 5-10].

The Mobile County Fire Department responded to the fire and commenced an investigation the same night. (R238, PP.7-8, ¶¶ 44, 50). The subsequent investigation by Fire Marshal Hansen determined multiple points of origin for the fire in the room of origin [R381, P.294:1-4, 15-22]. Test samples of carpeting taken by Hansen and previously taken by Fire Marshal Emmanuel Cook were tested by the Alabama Department of Forensic Sciences which tested positive for accelerant [R381, P. 396:21-23; P. 397:16-20; P. 398:6-9, 23-25; P. 399:10-12, 25; P. 400:3-8]. Hansen officially concluded the fire was intentionally set using an accelerant and not accidental. [R381, P. 326:17-23; P. 327:15-18].

Cincinnati hired a cause and origin expert, Harold Deese, who likewise found multiple points of origin [R382, P. 443: 15-25; P. 444: 1-9]. Deese determined, like Fire Marshal Hansen, that the burn patterns and multiple points of origin indicated the fire was intentionally set [R382, P. 490: 7-24]. Based upon their experience in investigating fires, both Hansen and Deese opined that this fire was incendiary rather than an electrical fire [R381, P. 326:17-23; P. 327:15-18; R382, P. 490: 7-24]. However, because Cochran interjected or attempted to interject a possible electrical cause, an electrical engineer, Owen Posey, was hired to investigate whether there was an electrical cause to the fire [R382, P. 608:25; P. 609:1-21]. Owen Posey determined that none of the electrical wiring, outlets, or equipment showed an electrical cause [R382, P. 626:1-8].

There was testimony that Cincinnati thoroughly investigated this claim and advanced payments pending its ultimate decision. Cincinnati rendered a decision once the claim was thoroughly investigated and all possible issues were properly considered [R383, P. 765: 18-25; P. 766: 1-6; P. 767: 8-17]. The claim file contained all the investigative and claim adjustment documentation compiled by Cincinnati over the course of the claim [R383, P. 753: 1-25; P. 754: 1-25; P. 755: 1-25; P. 756: 1-6].

Days after the fire, after various fire investigators, including Deese and Posey, had been to examine the scene and left, the Petitioners claim that Cochran and his best friend, while alone in the building, found a cord they believed showed the presence of an electrical short [R380, P. 1066:10-18; R385, P. 1201: 1-25; P. 1202: 1-25; P. 1203: 1-14]. The allegedly discovered cord was given to Petitioners' experts who claimed it showed evidence of an electrical short and could have been the cause of the fire. Cochran and his best friend did not turn this cord into the police or the fire department [R386, P. 1276: 1-25]. Petitioners' expert, Eleanor Posey (who was retained many years after the fire) also claimed that the cord showed evidence of shorting [R386, P. 1373:18-23; 1377:1-3]. However, Mrs. Posey testified that the fire could not have occurred as described in previous statements and testimony of Mr. Cochran [R386, P. 1375:16-21]. Electrical fires would not burn as rapidly as Mr. Cochran had indicated but rather would burn slowly [R386, P. 1376:20-25; 1377:1-11]. Mrs. Posey instead gave testimony that the arcing could have been going on for weeks, and contrary to Mr. Cochran's testimony, the fire could have actually been burning for up to an hour unnoticed by Cochran [R386, P.1378:24-25; 1379:1-4, 17-21]. Mrs. Posey testified it was possible that Cochran did not see the smoldering fire in the room of origin because the smoke was so heavy [R386, P. 1381:18-24]. This theory contradicts Mr. Cochran's trial testimony because he testified he did not see flames nor smell smoke when he entered the room [R383, P. 733: 14-22; P. 738:

5-8]. The Jury could easily find that Mrs. Posey's testimony was unbelievable and would defy common sense.

Testimony from Assistant Fire Marshal Hansen indicated the location where this wire supposedly shorted and caused the fire was really not in a point of origin [R381, P. 336:5-14; P. 371:17-25; P. 372:1-18]. Hansen testified there were separate, non-communicating areas of origin which was indicative of an intentional fire [R381, P. 294:21-25; 295:1822]. On cross-examination, Hansen was presented with various attacks on Owen Posey's electrical investigation as well as whether the scene had been spoiled [R381, P. 285:1-10]. Hansen testified he could render his opinion based upon the scene he found and the evidence collected. Hansen believed Owen Posey to be a credible, reliable source of information and expert with accurate determinations [R381, P. 283:7-25; P. 284:1-6 and 285:1-10].

Cochran also attacked Cincinnati's experts as well as the investigation by Cincinnati. This included presenting multiple theories such as the test results of Ms. Waters[6] showing medium petroleum distillates did not really show medium petroleum distillates [R382, P. 603: 9-18]. If the Jury did not buy that theory, Petitioners proffered the alternative theory that there were medium petroleum distillates all throughout the room due to tracking [R385, P. 1152: 19-25; P. 1153: 1-3; P. 1160: 24-25; P. 1161: 1-2].

Additionally, Petitioners also attempted to claim evidence was destroyed or altered[7] by Cincinnati, Deese or Posey

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6. Ms. Waters is a separate and independent forensic scientist with Analytical Forensic Associates who tested the samples taken by Deese which were submitted for independent analysis.

7. Petitioners claimed the fire scene was altered when certain electrical cords (inspected and discounted by Petitioners' experts as the cause of the fire) were removed by Deese to keep as evidence [R385, P. 1193:13-25; P. 1194:1-10]. Cochran had full knowledge of the removal of said items [R385, P. 1197:21-25; P. 1198:1-4]. Petitioners claimed

(Cont'd)

[R383, P. 814: 22-25; P. 815: 1-25; P. 816: 1-2].[8] The Jury obviously properly rejected these claims seeing through the hyperbolic, half truths, mis-characterizations, gamesmanship and rabbit trails.

Petitioners' Writ, under the section entitled "Evidence Excluded by the District Court" claims Petitioners proposed to offer certain evidence at trial regarding the actions and determinations of City of Mobile Fire Investigator Cook and Assistant Fire Marshall Dean but were denied the opportunity by the District Court. [Petitioners' Writ, p. 9]. This assertion is patently false and is not an issue properly before this Court. Petitioners failed to call Cook and Dean as witnesses at the trial of this matter and then tried to "call foul" in their Motion for New Trial before the District Court regarding alleged favorable testimony of Cook [R 358]. The District Court rejected Petitioners' argument given they had known of Cook's involvement for years, they had every right to call Cook as a witness but elected not to do so. [R 366]. Any assertion regarding said issue should be precluded from consideration.

(Cont'd)

diagram symbols used in different reports were not consistent in meaning [R382, P. 502:19-25; P. 503:1-10]. No expert claimed that Respondent or anyone on Respondent's behalf spiked the fire scene with medium petroleum distillates [R301, P. 25; Ex. B, P. 234]. Further only Cochran was present, according to him, when the fire began [R383, P. 731:14-25; P. 732:1-16].

8. This included Petitioners claiming, during their closing argument, that an electrical receptacle on the north wall which has an "N" tag and is shown in different pictures was destroyed by Respondent [R387, P.1477:22-25; P. 1478:1-2, 6-7]. During her deposition testimony Eleanor Posey, Petitioners' expert, admitted she was in possession of the north wall receptacle, or at least its remains. Eleanor Posey testified she had been in possession of it for years and took possession of it from Petitioners' counsel, Stephen Tunstall [R361, Ex. 1, P.380-385 and Ex. 2]. This truth did not prevent Petitioners from arguing in their closing that Respondent destroyed the receptacle for some nefarious purpose [R387, P. 1477:11-25; P. 1478:1-9].

REASONS FOR DENYING THE PETITION

Rule 10 of the Supreme Court provides that a "review of a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons." *Id.* Further, Rule 10 states that a "petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of properly stated rule of law. *Id.* A review of a writ "will be granted only where there are special and important reasons therefore." *Omar v. Harvey*, 479 F.3d 1, 7 (C.A.D.C. 2007). Justice Renquist, in a dissenting opinion, admitted "[a] high degree of selectivity is thereby enjoined upon [the Supreme Court] in exercising [its] certiorari jurisdiction" and "Rule 10 embodies the standards by which we decide to grant review." *Hubbard v. United States*, 514 U.S. 695, 720 (1995).

Contrary to Petitioners' assertions the decision affirmed by the Court of Appeals in this case is not in conflict with decisions of other Court of Appeals regarding these issues. This writ amounts in substance to an argument by Petitioners that the trial court and the Court of Appeals misapplied proper evidentiary and procedural rulings. There exists no novel issue of law involving this case. While omitting relevant and prejudicial undisputed facts, Petitioners attempt to sensationally create a grand conspiracy (among the insurance company, the police, the fire officials, defense attorneys, experts and possibly judges) through the entirety of their undisputed facts and argument to erroneously lead this Court to grant their writ. The issues raised in the Writ are not of monumental importance to the masses which would trigger discretionary review by this Court. Petitioners are simply attempting to unseal the fate handed down by the jury and affirmed by the District Court and the Court of Appeals.

However, a review of the material, undisputed facts and law demonstrate that no such conflict or novel, important legal issue exists. The Eleventh Circuit, pursuant to the deference

standard, affirmed the District Court's striking of the malicious prosecution claim and under the abuse of discretion standard found that the exclusion of irrelevant evidence was not erroneous and declined to disturb the District Court's proper findings. There is nothing unreasonable, or even, unusual about the ruling of the District Court and the concurrence by the Court of Appeals. Lastly, the decision reached by the District Court and affirmed by the Court of Appeals in this matter is not one that has a broad implications or significance to the majority to invoke review by this Court.

A. The Decision of the Court of Appeals is Not in Conflict With Decisions of Other Courts of Appeal

The questions presented by Petitioners in its Writ assert two claims regarding the proper striking of the malicious prosecution claim; specifically, (1) deference should not be given to the district court's order striking the claim because the authoring judge was not the judge interpreting the prior order along with a contention that *post hoc* additions not originally included were made in interpreting the order, and (2) the timing in which the malicious prosecution claim was struck was improper.

Contrary to Petitioner's assertions, the decision of the Court of Appeals regarding the procedural issue is not in conflict with other courts of appeal. Respondent agrees with the cases cited in the Writ which supports the general rule that deference is accorded a district court's interpretation of its own order which is supported by the Second, Third, Fifth, Seventh and Eleventh Circuits (*United States v. Spallone*, 399 F.3d 415 (2nd Cir. 2005), *DirecTV v. Leto*, 467 F.3d 842 (3rd Cir. 2006), *Alabama Nursing Home Ass'n v. Harris*, 617 F.2d 385 (5th Cir. 1980), *United States v. Board of Educ.*, 717 F.2d 378 (7th Cir. 1983), *Cave v. Singletary* 84 F.3d 1350 (11th Cir. 1996) and *Commercial Union Ins. Co. v. Sepco Corp.*, 918 F.2d 920 (11th Cir. 1990)). Respondent; however, disagrees with Petitioners' use of a dissenting opinion and general quotes taken out of context from other courts of

appeal cases in an attempt to invoke this Court's review under the guise that other courts of appeal have rendered inconsistent rulings.

In this matter, it was not possible for the authoring judge (Judge Hand) to interpret his own order since the case had been re-assigned to another district judge; specifically, Judge Butler. It is the contention of Respondent that re-assignment of the case to another district judge is not sufficient basis to exclude the deference review standard. While *Spallone* does hold that "substantial deference" is given to the authoring judge in interpreting his own orders, *Spallone* nor any other case cited by Petitioners support the proposition that *no* deference is given to another judge's interpretation of a prior order entered by the issuing court. *Id.* "Court orders are constructed like other written instruments, except that the determining factor is not the intent of the parties, but that of the issuing court." *Spallone* at 399 F.3d 424. Court orders "must ordinarily be interpreted by examination of only the 'four corners' of the document." *Spallone*, 399 F.3d at 424. Further, deference is afforded a district court's interpretation of an order when said interpretation is reasonable. *Cave*, 84 F.3d 1354. The District Court properly struck the claim for malicious prosecution.

To resolve the dispute regarding the newly added factual allegations of conspiracy to the proposed pretrial order filed on January 23, 2004, the District Court allowed Petitioners limited leave to amend the counterclaims so as to clarify the nature of the allegations in connection with the counterclaim for conspiracy [R122]. Specifically, the District Court's order stated:

> [I]n light of the factual allegations made by [Petitioners] in the proposed pretrial order (Doc.120), in particular factual allegations in connection with [Petitioners'] counterclaim for conspiracy, the Court **hereby GRANTS** to [Petitioners] **LEAVE TO AMEND** their

> counterclaims (Doc. 87) so as to clarify the specific nature of their allegations.

[R122] (original emphasis). The key word used in Judge Hand's order is "clarify." Respondent asserts the word "clarify" means to free from confusion, to make understandable. Petitioners attempted to amend their counterclaim outside the scope of the District Court's Order which was a limited leave to amend [R 122]. Said Order was not an opportunity to add new claims to the existing counterclaim; Petitioners were simply allowed to "*clarify the specific nature of their allegations*." *Id.* Judge Butler, in reviewing all matters related to the order at issue, first found that Petitioners' only objection presented was of timeliness [R210] regarding Respondent's Motion to Clarify [R194]. Judge Butler rejected the timeliness argument as Petitioners cited a non-existent Local Rule and two FRCP rules which were not applicable to the issue presented by Respondent. [R 216, pgs. 1- 2, Petitioners' Writ, App. B]. Judge Butler further noted that Petitioners' objection "did not claim that Judge Hand intended to grant leave to add a malicious prosecution claim." [R216, p. 2, FN1; Petitioners' Writ, App. B]. Lastly, Judge Butler found that the District Court granted leave to amend to clarify the specific nature of the factual allegations in the proposed pretrial order and

> [g]ranting permission to clarify factual allegations is not equivalent to granting permission to add counterclaims. Moreover, [the District Court's] order contemplated that the amendments would be based on the proposed pretrial order which makes no mention of malicious prosecution. While there is some overlap between the allegations related to the conspiracy claim and the late-added malicious claim, a key element of malicious prosecution (termination of the underlying action in factor of the party seeking recovery) could not have occurred until after the proposed order was filed on January 23, 2004.

[R216, p. 2, FN1; Petitioners' Writ, App. B]. It was clearly within the purview of the District Court to strike the purported claim as the addition was not a clarification but an amendment. Further, at the time the proposed pretrial order was jointly filed by the parties, a claim for malicious prosecution was not ripe for adjudication.[9] Judge Butler's review of Judge Hand's prior order was not a cursory review nor was it a departure of the accepted and usual course of judicial proceedings. Judge Butler's interpretation of Judge Hand's order did not change the intent of or rewrite Judge Hand's prior order nor did it add *post hoc* language which was not originally included in Judge Hand's order. While a district court is not permitted to add provisions to an order that were not there originally, deference will be provided to a district court's reasonably interpretation of a prior order. *Cave*, 84 F3d. 1354 and *Dudley ex rel. Estate of Patton v. Penn-America Ins.*, 313 F3d 662 (2nd Cir. 2002).

The striking of the malicious prosecution counterclaim was not arbitrary but a reasonable interpretation of Judge Hand's order. In exercising its discretion, there are "usually a range of choices" a district court "may make and still be affirmed; there is not only one right choice for the court to make." *Blasland, Bouck & Lee, Inc. v. City of North Miami*, 283 F.3d 1286, 1298 (11th Cir. 2002) (*see also In re Rasbury*, 24 F.3d 159, 168 (11th Cir. 1994)). Respondent contends that in reviewing the language of Judge Butler's order, it is apparent the District Court took into consideration not only the wording and context of Judge Hand's prior order, but also the reasoning which supported the limited leave to amend the counterclaims to clarify the specific

9. It is irrelevant that Cochran's criminal case was dismissed three days prior to the pretrial conference. Cochran's criminal conviction had not been set aside on January 23, 2004, when the parties filed their jointly prepared proposed pretrial order with the District Court. [R120]. Even if Petitioners' factual allegations contained in the proposed pretrial order included allegations of malicious prosecution, said claims were not ripe for adjudication and due to be stricken. [R123, p.13]. Further, Petitioners' subsequent Motion for Leave to Amend to add various counterclaims was denied. [R172].

nature of the allegations, the motion to clarify and the motion to strike. After three scheduling orders, discovery cutoffs and trial settings [R15, R28 and R84], a review of the procedural history of the issues involved and the arguments made, the District Court, within its discretion, properly struck the newly added malicious prosecution claim as such claim exceeded the scope of District Court's order. After the passing of numerous procedural events and Respondent's objection to Petitioners additional factual allegations in the jointly filed Pretrial Report which were not previously plead, the District Court allowed Petitioners leave to clarify the nature of their claims; specifically the conspiracy claims. Petitioners, in the opinion of the District Court, tried to take such limited leave to clarify as an unbridled license to add completely new claims to the case which had been pending for approximately six years in which numerous deadlines to amend had already expired. As the procedural history of the case demonstrates, Petitioners had ample time to amend their counterclaims and assert all valid claims. The District Court's order was not an opportunity to reopen the case to claims never plead before at such late stage in the lawsuit. Respondent contends the District Court had the discretionary right to maintain control of this case and to rein in Petitioners' behavior in light of the various discovery abuses[10] so as to move this case to a conclusion in the interests of judicial economy.

Based on the foregoing, the Court of Appeals properly afforded deference to the District Court's reasonable interpretation of the order striking of the malicious prosecution claim and found no erroneous departure from the accepted and usual course of judicial proceedings.

Petitioners also claim it was improper for the District Court to strike the malicious prosecution claim that was filed 8 months earlier with no objection posed by Respondent. The District Court found that Petitioners had exceeded the authority of the Court's prior order by adding the malicious prosecution claim and commented that 'this sleight of hand went undetected for a

10. See footnotes 2 and 3 above.

period of months, and now [petitioners] allege it is too late for the Court to do anything about it." [Petitioners' Writ, App. B]. The District Court found that Respondent's failure to bring the discrepancy to the Court's attention sooner was unimportant and understandable:

> The attorneys who had represented [respondent] since the beginning of this lengthy litigation were forced to withdraw when [petitioners] named them as conspirators in the February 2004 counterclaims. Since [respondent's] current counsel was not involved in the Pretrial Conference before Judge Hand, the discrepancy would not have been readily apparent to them. Moreover, [respondent's] counsel have not been sitting idly by these past few months, given the activity in this case.

[Petitioners' Writ, App. B]. Lastly, the District Court held that it had the inherent authority to enforce its own orders. Said ruling is consistent with the case law presented above that a District Court's interpretation of its own order will not be disturb unless said interpretations was not reasonable. The decision rendered by the District Court and affirmed by the Court of Appeals should stand undisturbed.

B. Petitioners Have Failed to Assert that there is a Conflict Amongst the Courts of Appeal regarding the Exclusion of Evidence of the Alleged Prior Bad Acts of Deese

First and foremost, Petitioners have failed to assert a valid ground to trigger this Court's review of the evidentiary ruling of the District Court and the affirmation by the Court of Appeals. Further, Petitioners' Writ is void of any legal analysis to establish a conflict amongst the other circuits on this issue or any other basis articulated in Supreme Court Rule 10.

Petitioners have also failed to establish that the District Court erred in precluding evidence of Harold Deese allegedly tampering with the Spread Lounge and Chickasaw, AL fire

scenes in 1986 and 1991, respectively. Additionally, Petitioners failed to establish that the District Court improperly excluded evidence related to Attorney John Richardson's supposed knowledge concerning Deese's alleged illicit activity in 1986. Since the District Court clearly acted within the bounds and scope of the Federal Rules of Evidence and applicable case law, the Court of Appeals, pursuant to an abuse of discretion standard, affirmed the District Court's ruling. This Court should uphold the evidentiary rulings with respect to this issue.

On November 4, 2004, Respondent filed a motion *in limine* with respect to the 1984 Spread Lounge fire [R240]. Respondent sought to preclude alleged evidence that Deese tampered with the fire scene; whether Attorney Richardson knew whether Deese tampered with the scene; and, whether Richardson directed Deese to tamper with the fire in this case on appeal. The Petitioners *failed* to file a response to Respondent's motion.

On March 7, 2005, the District Court, after giving Petitioners approximately four months to file a response, entered an order granting, in part, Respondent's motion as related to either Deese or Richardson's involvement in the Spread Lounge fire [R276]. However, it stopped short of precluding the admissibility of evidence proving Richardson directed Deese to tamper with the fire scene. It stated such evidence was admissible, *if such evidence exists* [R276, p. 2].[11] The District Court noted that no response had been filed to Respondent's Motion *in Limine*.

On March 10, 2005, Petitioners filed an objection to Respondent's Motion *in Limine* Regarding Expert Harold Deese Previously Altering a Fire Scene. [R281]. However, since the District Court had already ruled on the Motion *in Limine* , the objection was actually a Motion to Reconsider. In the motion, Petitioners argued against precluding evidence related to the Spread Lounge fire and how Deese tampered with the fire scene

11. Cochran failed to present any evidence at trial that Richardson directed Deese to tamper with the fire scene as none existed.

[R281, P. 1-4; 5-17]. Additionally, Petitioners included new evidence of the second fire in Chickasaw, AL with fresh allegations of Deese's alleged illicit activity and Attorney Richardson's alleged involvement in same [R281, P. 4-5].

Once again, on March 9, 2005, Petitioners filed a Motion to Amend the Pretrial Order; this time, to include new witnesses and evidence related to the Chickasaw, AL fire [R282]. Said relief was sought after having already filed three amended counterclaims, four separate discovery disclosures, the first pretrial order and after the actual discovery cutoff had passed.

On March 23, 2005, Respondent filed a motion *in limine* with respect to the Chickasaw, AL fire; responded to Petitioners' Motion to Reconsider; and, Objected to Petitioners' Motion to Amend the Pretrial Order to include newly discovered evidence [R286]. Respondent noted the Court already ruled on the inadmissibility of the Spread Lounge fire; that the evidence supporting the belief that Deese altered the 1991 Chickasaw fire scene was unsubstantiated and that the fire itself was not temporally related to the instant action; finally, that Petitioners' motion to amend was untimely and failed to provide any authority to substantiate the sought after relief.

Respondent filed a response to the Motion *in Limine* regarding the Chickasaw, AL fire [R289]. Petitioners essentially adopted by reference their Motion to Reconsider previously filed [*Id.*]. Additionally, Petitioners attached as an exhibit the complaint for declaratory judgement related to the 1991 Chickasaw, AL fire [R289, Ex. A]. Neither party to that complaint were parties to this action.

On April 14, 2005, the District Court entered an order [R296]. The Court stated that because Petitioners raised a FRE 404(b) argument with respect to the Spread Lounge fire it would reconsider its ruling. However, the Court found that Petitioners failed to meet the 404(b) prior bad act admissibility standard set forth in *U.S. v. Cancilliere*, 69 F.3d 1116, 1124 (11th Cir. 1995). Similarly, the Court found that Petitioners failed to meet

the *Cancilliere* standard with respect to the Chickasaw, AL fire. Hence, the District Court affirmed its prior ruling on the inadmissibility of the Spread Lounge fire and granted Respondent's Motion *in Limine* with respect to the Chickasaw, AL fire.

As raised in opposition to the appeal below, the first issue is whether Petitioners have a right to raise the issue on appeal whether the District Court erred in precluding evidence of the Spread Lounge fire after they had not timely raised an objection to Respondent's Motion *in Limine*. [R240]. "[W]e note that as a general rule, the failure of a litigant to make timely objections to alleged errors in the proceedings or to rulings by the court waives those objections for purposes of appeal unless the error is so 'fundamental as to result in a miscarriage of justice'." *Lee v. Dallas County Bd. of Edu.*, 578 F.2d 1177, 1179 (5th Cir. 1978).

Based on the District Court's April 14, 2005 Order [R296], the only issue that survived the District Court's March 7, 2005 Order [R276] was whether the District Court should have allowed evidence of the Spread Lounge fire based upon the exceptions listed in FRE 404(b). Moreover, said issue was treated as a Motion to Reconsider, as the Court noted that an Order had been entered with respect to the inadmissibility of the Spread Lounge fire, but had not considered same under the 404(b) exceptions. Nonetheless, the Court affirmed its prior ruling upon consideration of the merits [R296]. Petitioners now bring this issue on appeal with respect to the admissibility of evidence related to the Spread Lounge fire.

The rulings by the District Court and the Court of Appeals regarding the Spread Lounge fire should be upheld. *Medley v. Westpoint Stevens, Inc.*, 162 F.R.D. 697 (M.D. Ala. 1995) sets forth the applicable law regarding a Motion to Reconsider:

> A motion to reconsider is properly brought to correct a clear error in the court's interpretation of either the facts or law. Rule 59(e) Fed. R. Civ. P. It should

> be used in order to prevent manifest injustice, however, it is an extreme measure, and substantial discretion rests with the court in granting such a motion. E.g., *O'Neal v. Kennamer*, 958 F.2d 1044, 1047 (11th Cir.). ("The decision to alter or amend a judgment is committed to the sound discretion of the district court").

Id. at 698.

The District Court has an enormous amount of discretion as to whether it should vacate a prior ruling. This Circuit has elaborated on one of the practical purposes of the abuse of discretion standard:

> Inherent in this [abuse of discretion] standard is the firm recognition that there are difficult evidentiary rulings that turn on matters uniquely within the purview of the district court, which has first-hand access to documentary evidence and is physically proximate to testifying witnesses and the jury.

Tran v. Toyota Motor Co., 420 F.3d 1310, 1315 (11th Cir. 2005). (Citing *United States v. Jernigan*, 341 F.3d 1273, 1285 (11th Cir. 2003). Here, the record clearly reflects that this Court should defer to the District Court's ruling.

The District Court, citing *United States v. Veltmann*, 6 F.3d 1483, 1498 (11th Cir. 1993) stated "[e]xtrinsic evidence that a witness committed crimes, wrongs, or other acts in the past is not admissible to prove that he acted similarly on a subsequent occasion." The District Court conceded that evidence of a witness's other crimes or wrongs may be admitted for other purposes under FRE 404(b) but set out its analysis of why Petitioners' argument failed. Petitioners claimed the purpose of the evidence was to prove knowledge and absence of mistake. The District Court first found that Petitioners failed to identify the alleged knowledge "that should be imputed to [respondent] or the issue to which that knowledge is relevant." [R296, p. 2;

Petitioners' Writ, App. E]. The District Court also opined that Petitioners simply listed various actions of Deese allegedly done during his investigation to support their absence of mistake argument; however, Petitioners failed to explain 'why the specifics of the prior acts make it more likely that specific actions in this case were not due to mistake." [R296, pgs. 23; Petitioners' Writ, App. E]. Lastly, in further examining the potential admissibility under 404(b), the District Court found that the alleged evidence of prior wrongs was disputed and that the "prejudicial effect of such evidence far outweighs its probative value." [R296, p. 3; Petitioners' Writ, App. E]. After careful consideration, the District Court properly excluded the evidence as it failed to meet the exceptions stated in FRE 403 under *Cancilliere* and lacked any impeachment value under FRE 608(b).

Said decision was not based simply on the predicate that Deese's alleged illicit investigation would have to result in a criminal conviction in order to be admissible, as presented in Petitioners' argument.[12] To the contrary, the District Court had ample reason to preclude evidence of the Spread Lounge fire. First, Deese was neither arrested nor convicted as a result of his investigation of the Spread Lounge fire. In fact, the investigating officer admitted that he never had probable cause to even arrest Deese [R240, P. 3]. Moreover, the investigator was ordered to cease his investigation of Deese and was removed entirely from the investigation by his own supervisors [R240, P. 3]. There was no evidence to suggest this was done by Respondent, Attorney Richardson and/or Deese.

12. In their appeal to the Eleventh Circuit, Petitioners included new facts to support their argument, namely that Attorney Richardson shut down Maddox's investigation to protect Deese from prosecution and Petitioners have included said insinuation in their Writ before the Court [Petitioners' Writ, p. 8]. This fact was of first impression before the Court of Appeals and should be precluded from consideration in this matter. Moreover, said theory lacks any supporting evidence, is merely speculation, and amounts to an accusation of obstruction of justice. There is nothing in the record to support this libelous statement.

Further, the allegations made against Deese with respect to the Spread Lounge fire vastly differ from the allegations made in the instant appeal. There, one investigator suspected Deese of possibly spiking a fire scene with gasoline to give the scene the false appearance of arson (the government's fire investigators had actually ruled the fire an arson based on evidence collected prior to Deese's arrival at the scene) [R240, P. 3]. Here, Deese was never accused of such conduct. Additionally, Deese has vigorously maintained that he neither removed any evidence from Petitioners' shop nor mislabeled the points of origin [R382, P. 538:23 through P. 540:14; P. 556:23-25; P. 557:5]. The 1986 allegation was never substantiated and Petitioners failed to substantiate any alleged impropriety on the part of Deese at the trial of this matter [R240, P. 3].

There is also no causal connection between Respondent and the Spread Lounge fire. Respondent was simply never a party connected to the Spread Lounge fire and there is no evidence that Respondent was even aware of Deese's involvement in same [R240, P. 4-5]. Further, the Spread Lounge fire took place in 1986, approximately twelve years prior the fire in the instant appeal took place [R240, P. 4]. Finally, the Spread Lounge fire was labeled arson prior to Deese's involvement, which begs the question of how he could be suspected of impropriety in the first place [R240, P. 5].

The relationship between the Spread Lounge fire and the instant action was completely remote in both scope and time, the District Court properly precluded evidence of same. The Court of Appeals concurred with the ruling of the District Court hence this Court should affirm the lower court's ruling on this matter.

The second issue is whether the District Court erred in precluding the evidence related to the Chickasaw, AL fire. Again, Respondent states that the District Court's ruling is due to be affirmed. The District Court went through a reasoned analysis why Petitioners' objection to Respondent's Motion *in Limine*

lacked merit. Namely, their objection and reasons to include the evidence did not meet the *Cancilliere* standard. Petitioners failed to state specifically how Deese's alleged prior bad acts related to his actions in the instant action prove absence of mistake, and attempted to offer completely inadmissible proof of coincidence because Deese has ruled arson in, "70-80% [sic] of the fire scenes he investigate[d]. . . ." [R296, p. 3], which essentially and inappropriately states that Deese rubber-stamps fire scenes.

However, the District Court did not stop its analysis with the first part of the test in *Cancilliere*. The District Court continued in its analysis under the remaining two prongs and determined the evidence was inadmissible under any part of the test. While Petitioners argue the District Court failed to note their objection to the preclusion of the evidence in light of its breach of contract, bad faith and conspiracy claims, Respondent notes that the insurance company at issue in the Chickasaw fire was The Hartford Insurance Company, who was not a party to this action R286, P. 6]. Petitioners presented no evidence that Respondent had knowledge of these accusations against Deese.

Moreover, Petitioners failed to produced any evidence of either probable cause, an investigation, or the arrest and conviction of Deese for any alleged illegal activity as related to the aforementioned fire. There was simply a disagreement of information provided by Deese to the Chickasaw, AL arson investigator. [R286, P. 3-4]. There is no evidence showing that Deese either altered or spiked the fire scene, and Deese vigorously opposes such false innuendos [R286, P. 3, 5].

The Court of Appeals noted in its opinion that it had "carefully studied the voluminous record on this issue in this appeal." [Petitioners' Writ, App. A]. *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512 (1997) sets forth the proper standard of review with respect to evidentiary rulings: "We have held that abuse of discretion is the proper standard of review of a district court's evidentiary rulings." *Id.* at 141, 118 S. Ct. at

517. (Citing *Old Chief v. United States*, 519 U.S. 172, 174 n. 1, 117 S. Ct. 644, 647 n. 1 (1997); *United States v. Abel*, 469 U.S. 45, 54, 105 S. Ct. 465, 470 (1984). Additionally, the Court noted the grounds mandating the reversal of a District Court's evidentiary rulings: "[c]ases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case, unless the ruling is *manifestly erroneous*." *Id.* at 142, 118 S. Ct. at 517. (Citing *Spring Co. v. Edgar*, 99 U.S. 645, 658 (1879)).

It is plainly evident the District Court's rulings were not manifestly erroneous. Its rulings were grounded in sound reasoning and logic under the Federal Rules of Evidence and applicable case law. Petitioners propounded no meritorious argument why the District Court's rulings should be reversed, as the court set forth several grounds underlying why the evidence was precluded from the record. "When a district court has discretion, there are usually a range of choices it may make and still be affirmed; there is not only one right choice for the court to make." *Blasland, Bouck & Lee, Inc. v. City of North Miami*, 283 F.3d 1286,1298 (11th Cir. 2002). *See also In re Rasbury*, 24 F.3d 159, 168 (11th Cir. 1994). The District Court provided several sound reasons why the evidence related to the Spread Lounge and Chickasaw, AL fires were due to be precluded. The rulings were not manifestly erroneous. Thus, this Court should adopt and affirm the District Court's determination that the evidence was properly due to be precluded and the Court of Appeals subsequent concurrence.

Petitioners claim that in affirming the exclusion of the evidence, the Court of Appeals rubber-stamped the District Court's ruling by providing

> no analysis, failed to address any 404(b) issues and simply concluded that the evidence 'was not relevant under Fed.R.Civ.Evid. 401 in the present case, would unduly prejudice [Respondent] under Fed.R.Evid.

403, and failed to meet the exceptions stated in Fed.R.Evid. 403.'

[Writ, p. 28]. Petitioners; however, have failed to provide any legal citations to support their contention that because the Court of Appeals affirmed the lower court's ruling without any detailed analysis or lengthy discussion that said affirmation is an erroneous conclusion of law.

CONCLUSION

Petitioners have wholly failed to submit any evidence and/or case law to satisfy the requisite criteria to trigger this Court's granting review of the Writ of Certiorari. Petitioners have failed to demonstrate inconsistent decisions amongst the Court of Appeals as to the procedural issue presented and absolutely no legal basis to support this Court's review under Supreme Court Rule 10 as to the evidentiary issue presented. Based upon the foregoing, Petitioners' Writ of Certiorari is due to be denied.

Respectfully submitted,

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